Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

WENDE C. and DAVID C. (ANONYMOUS),

Petitioners,

v.

THE UNITED METHODIST CHURCH, NEW YORK WEST AREA, 1010 East Avenue, Rochester, New York, 14607; THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH, 8499 Main Street, Buffalo, New York 14221, DR. G. CHARLES TEN EYCK, Individually and in his capacity as Pastor of the HOSANNA JUNCTION UNITED METHODIST CHURCH, 357 Fairport Road, Rt. 31F, East Rochester, New York 14445; HAE-JONG KIM, Resident Bishop, THE UNITED METHODIST CHURCH, NEW YORK WEST AREA, 1010 East Avenue, Rochester, New York 14607; DAVID LUBBA, District Superintendent, Rochester District, The United Methodist Church, 1050-A, East Avenue, Rochester, New York 14607,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The New York State Court of Appeals declined to determine the standard of care owed to parishioners who undergo secular ministerial counseling and are subject to clergy-congregant sexual misconduct. The decision below conflicts with the neutral principles of law doctrine established by this Court in *Jones v. Wolf*, 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020 (1979), which established that a State may adopt any approach to resolving religious disputes which does not entail consideration of ecclesiastical doctrine. The Court of Appeals' decision conflicts with the holdings of several circuits nationwide, including the Second Circuit, in which courts have ruled that the First Amendment is not a bar to jurisdiction over these claims, and that sexual misconduct does not now, nor has it ever, entailed consideration of ecclesiastical doctrine or dogma.

One question is presented:

1. Whether the neutral principles of law doctrine requires anything more than the simple inquiry as to whether leaders of nonreligious organizations would be subject to liability for similar conduct with their members, or should secular tort claims against the clergy, including, *inter alia*, breach of fiduciary duty and clergy malpractice, be perfunctorily dismissed as violative of the religion clauses of the First Amendment?

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioners in this case are David C. and Wende C. Petitioners were the plaintiffs in the Monroe County State Supreme Court, the appellants in the Supreme Court Fourth Department Appellate Division, and the appellants in the State of New York Court of Appeals.

2. Respondents United Methodist Church, New York West Area, Western New York Conference of United Methodist Church, and Bishop Kim were the defendants in the Monroe County Supreme Court, the appellees in the Supreme Court Fourth Department Appellate Division, and the respondents in the State of New York Court of Appeals.

3. Respondent Dr. G. Charles T. (Pastor T.) was a named defendants in the Monroe County Supreme Court, an appellee in the Supreme Court Fourth Department Appellate Division, and a respondent in the State of New York Court of Appeals. Pastor T. did not file any responding papers to Petitioners' Motion for Summary Judgment in the Monroe County Supreme Court, nor did he file a brief in response to the appeal filed in the Supreme Court Fourth Department Appellate Division, nor did he file a brief in response to Petitioners' appeal to the New York State Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	ix
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The Facts	2
B. The Proceedings Below	5
1. The Complaint	5
2. United Methodist Church Motion for Summary Judgment	5
3. Petitioners' Opposition & Cross Motion for Summary Judgment against the Respondent Conference and Dave Lubba	6
4. Petitioners' Motions for Summary Judgment Against Remaining Respondents Pastor T., Bishop Kim and Hosanna Junction	6
5. Cross Motion for Summary Judgment by Respondents Bishop Kim and Hosanna Junction	6

6. The Supreme Court Order 7

7. The Appeal to the Supreme Court Fourth Department Appellate Division 7

8. The Appeal to the New York State Court of Appeals 8

REASONS FOR ALLOWANCE OF THE WRIT 10

I. The Court Of Appeals Decision Conflicts With The Decisions of Numerous Courts Nationwide On A Critical And Fully-Developed Issue Of First Amendment Interpretation Affecting the Rights of Victims of Errant Clergy Nationwide 15

A. The Decision Below Runs Afoul of The Neutral Principles of Law Doctrine Established by This Court In *Jones v. Wolf* 15

B. The Decision Below Conflicts With The Decision of This Court That The Judicial Abstention Doctrine Is Not Applicable Where the Dispute May Be Resolved By Application of Neutral Principles of Law 17

C. The Decision Below Conflicts With Courts Nationwide that Have Refused to Permit The First Amendment To Be Invoked As A Defense To Otherwise Secular Torts 18

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Adams v. Moore, 385 S.E. 2d 799, 801 (N.C. Ct. App. 1989) 21n.12

Amato v. Greenquist, 679 N.E. 2d 446 (Ill. App. Ct. 1997) 11n.4

Bob Jones Univ. v. United States, 461 U.S. 574, (1983) 13n.9

Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789 (Okla. 1993) 11n.4

Bollard v. Cal Province of the Soc'y of Jesus, 196 F. 3d 940, 947-48 (9th Cir. 1999) 18-19

Byrd v. Faber, 565 N.E. 2d 584 (Ohio 1991)..... 11n.4

Cantwell v. State of Connecticut, 310 U.S. 296 (1940) 13n.9, 16

Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994)..... 11n.4

Davis v. Beason, 133 U.S. 333 (1890) 13n.9

Destafano v. Grabian, 763 P.2d 275 (Colo. 1988) 12n.7, 21

Doe v. Roman Catholic Diocese, 862 S.W. 2d 338 (Mo. 1993)..... 11n.4

Doe v. Evans, 718 So. 2d 286, 1998 Fla. App. LEXIS 11438, 23 Fla. L. Weekly D 2077 14 I.E.R. Cas (BNA) 577, 137 Lab. Cas. (CCH) P 58516 (Fla. Dist. Ct. App, 4th Dist. 1998) 12n.7, 21

E.J.M. v. Archdiocese of Phila., 622 A. 2d 1388 (Pa. Super. Ct. 1993) 11n.4

Eldridge v. May, 150 A. 378, 379 (Me. 1930) 21n.12

Employment Div. Dept. Of Oregon v. Smith,
494 U.S. 872, 877, 110 S.Ct. 1595, 1599,
108 L.Ed. 2d 876, 884 (1990) 16

Erickson v. Christenson, 781 P.2d 383, 384 ..... 12n.7, 21

F.G. v. MacDonell, 696 A.2d 697
(N.J. 1997) 11n.4, 12n.6, 21

First Presbyt. Church of Schenectady v.
United Presbyt. Church in U.S. of Am.,
62 N.Y. 2d 110, 116 [1984] 9

General Council on Finance and Administration of
the United Methodist Church v. Superior Court
of California, 439 U.S. 1355, 1369 (1978) 17-18

Gillette v. United States, 401 U.S. 437, 462-63
(1971) 16n.10

Goldman v. Weinberger, 475, U.S. 503, 510
(1986) 16n.10

Gonzalez v. Roman Catholic Archbishop,
280 U.S. 1, 16 (1929) 17n.11

Handley v. Richards, 518 So. 2d 682 (Ala. 1987)..... 11n.4

Heffron v. Int'l Soc'y for Krisha Consciousness, Inc.,
452 U.S. 640, 655-56 (1981)..... 16n.10

Hester v. Barnett, 723 S.W. 2d 544
(Mo. Ct. App. 1987) 11n.4

Higgins v. Chicago Title & Trust Co.,
143 N.E. 482, 484 (Ill. 1924) 20n.12

Isley v. Capuchin Province, 880 F. Supp. 1138
(E.D. Mich. 1995) 11n.4

Jones v. Trane, 591 N.Y.S.2d 927 (Sup. Ct. 1992) 11n.4, 12n.7, 20

Jones v. Wolf, 443 U.S. 595, 602, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) 15

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) 17n.11

Langford v. Roman Catholic Diocese, 705 N.Y.S. 2d 661, 662 (App. Div. 2000) 11n.3

Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409 (2d Cir. 1999)..... 12n.8, 19, 20

Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970) 1, 17, 18

Md. v. Va. Eldership Churches of God at Sharpsburg, Inc., 396 US 367, 369 [1970] 9

Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993) 20, 21, 11n.4, 12n.7

Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948 (Cal. 1988) 12

Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969) 17n.11

Prtizlaff v. Archdiocese of Milwaukee, 533 N.W. 2d 780, 794 (Wis. 1995) 10n.2

Sander v. Casa View Baptist Church, 134 F. 3d 331 (5th Cir 1998)..... 11n.4, 12n.7, 19, 21

Schieffer v. Catholic Archdiocese, 508 N.W. 2d 907 (Neb. 1993)..... 11n.4

Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991) 11n.3, 11n.4

Serbian v. Orthodox Dioces v. Milivojevich, 426 U.S. 696 (1976) 17n.11

State ex rel Harris v. Gautier, 147 So. 240, 242 (Fla. 1933) 20n.12

Strock v. Pressnell, 527 N.E, 2d 1235 (Ohio 1988) 11n.4

United States v. Lee, 455 U.S. 252 (1982) 13n.9, 16n.10

Watson v. Jones, 80 U.S. 679, 727 (1871) 17, 18

Statutes

CPLR § 3212 5

CPLR § 5601 (a) 8

Restatement (Second) of Torts 874 (1979) 19, 20

Other

Faith in Justice: Fiduciaries, Malpractice and Sexual Abuse by Clergy, 8 Mich. J. Gender & L. 45 (2001) 20n.12

Janice D. Villiers, Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship, 74 DENV. U.L.REV.1 (1996) 2n.1

Ohio Psychotherapist Civil Liability for Sexual Relations with Former Patients, 26 U.TOL.L.REV. 547, 548-53 (1995) 2n.1

TABLE OF APPENDICES

	Page
Appendix A — Memorandum Decision of the State of New York Supreme Court: County of Monroe, Dated and Filed August 26, 2002	1a
Appendix B — Memorandum and Order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, Dated and Filed April 30, 2004	13a
Appendix C — Opinion of the State of New York Court of Appeals, Dated and Filed February 22, 2005	29a
Appendix D — Summons with Complaint, Dated October 18, 2000 and Filed November 2, 2000	37a

PETITION FOR A WRIT OF CERTIORARI

Petitioners Wende C. And David C. hereby petition this Court to grant a writ of certiorari to review the decision below of the New York State Court of Appeals. Resting its holding on *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.* 396 U.S. 367 (1970), the Court of Appeals discerned no difference between allegations of clergy malpractice and breach of fiduciary duty. Further, the Court determined that the issue of pastoral sexual misconduct was in essence a "religious dispute" in which they could not become entangled under the First Amendment because it would require inquiry into religious beliefs and practices. (App. C-32a–33a).

OPINION BELOW

The opinion of the Court of Appeals, was entered on February 22, 2005 and is set forth at App. (C-29a–36a). The memorandum decision of the Supreme Court Fourth Department Appellate Division was entered April 30, 2004 Division and is set forth at App. (B-14a–28a). The memorandum decision of the Monroe County Supreme Court is set forth at App. (A-1a–13a).

STATEMENT OF JURISDICTION

The judgment of the New York State Court of Appeals was entered on February 22, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

or abridging the freedom of speech. . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. The Facts

1. It is undisputed that the Petitioners received contemporaneous secular marital counseling from Pastor T., BA, Div, DM, an ordained elder of the church, who had no license for professional counseling or marital counseling per se. The gravamen of the Petitioner's claims are that Pastor T. engaged in an inappropriate sexual relationship with Wende C., a vulnerable parishioner[1], during this counseling process, and while counseling David C. on the failing status of their marriage, breaching his fiduciary duty to both Petitioners.

As early as February 1999, Pastor T. informed Respondent Lubba that Wende C. wanted to cease the counseling relationship because she felt it was inappropriate. Despite her protestations, Pastor T. persisted in attempting to counsel her. Pastor T. informed Wende C. that "it's *procedure* to call the

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[1] Pastor T. administered several secular psychological tests to Wende C. during their counseling sessions, including the "Meyers Briggs" and "Keirsey Temperament Sorter," and was acutely aware of her vulnerabilities. *See, e.g. Janice D. Villiers, Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U.L. REV. 1 (1996) (noting that although most consensual sexual relationships between adults are not actionable, there are exceptions. Therapists, physicians, and divorce lawyers can be subject to civil liability (as well as professional sanctions) for engaging in sexual relations with their patients or clients. There is obviously, a common theme with respect to these types of relationships: In all instances noted above, there is a power imbalance between the two parties to the relationship). *See also* Ronald J. Maurer, *Ohio Psychotherapist Civil Liability for Sexual Relations with Former Patients*, 26 U. TOL. L. REV. 547, 548-53 (1995)(describing the relationship as one in which the therapist is acutely aware of the patient's vulnerability).

District Superintendent on these matters," and that indeed, he had contacted the District Superintendent. However, Respondent Lubba never contacted Wende C. on this matter.

On December 13, 1999, a member of the church wrote to Respondent Bishop Kim and informed him that she believed an inappropriate counseling relationship was occurring between Wende C. and Pastor T. On December 15, 1999 another church member wrote to the Bishop claiming she witnessed an inappropriate relationship between Pastor T. and Wende C., but the church did nothing to investigate these claims. This same witness claims also to have been sexually confronted by Pastor T. as well; she also claims to have witnessed Pastor T. sexually harass another church member.

On January 15, 1999, Bishop Kim wrote back in response to the December 13, 1999 letter and informed the church member her that the allegations of improper pastoral counseling were "*not worthy of complaint or of formal charges*" because he "*thoroughly investigated and researched the situation and allegations* made in [the] letter dated December 13, 1999."

Bishop Kim then advised this church member that if she wanted to pursue filing a complaint of improper pastoral counseling that she should look at the 1996 Book of Discipline. Bishop Kim then attached a copy of the "suggested local church policy" as issued by the General Conference of Finance and Administration of the United Methodist Church. A copy of Bishop Kim's letter was copied to Pastor T. and Dave Lubba.

Despite the fact that Bishop Kim claimed to have "thoroughly investigated" the claims of inappropriate counseling, neither Petitioner was ever confronted with this matter by the Bishop, the District Superintendent, or any other church official. Neither was interviewed, nor asked any questions with reference to this complaint, despite the existence

of clear policy mandates promulgated by the church that Bishop Kim do so. Furthermore, Bishop Kim did not disclose this information to the Pastor Staff Parish Relations Committee as it is required under guidelines set forth in 1998.

Neither District Superintendent Lubba nor Bishop Kim did anything to investigate or take any further action with regard to this claim, despite the existence of a policy and guidelines that commanded him to do so in light of their own recent experience with pastoral sexual abuse within the church.

Accordingly Pastor T. continued to expose Wende C. to unwelcome sexual contact: on November 2, 1999 (oral sex); on November 16, 1999 (fondling and other sexual acts); on December 24, 1999 (kissing and grabbing); on January 21, 2000 (fondling breasts and genitals). This exploitation occurred during counseling sessions and at a time when she was unable to consent.

On February 8, 2000 David C. located two (2) amorous e-mails from Pastor T. addressed to Wende C. David C. went immediately to the Leadership Council present these e-mails; together they decided to confront the Pastor. On February 9, 2000, David C. shared the two e-mails with Jim Coleman, the Leadership Council Lay Leader who informed David C. "this is very serious; boy I don't know what I would do if I were you."

On February 10, 1999, David C. attended a meeting with Linda Henry, Jim Coleman and Pastor T. David C. informed Pastor T. that his family was going to leave the church and warned the Pastor to stay away from his wife, or else he would contact the District Superintendent.

In the interim, Pastor T. took a six month sabbatical, fully paid for by the church. On or about September 22, 2000, Wende C. and David C. served upon Defendant Bishop Hae Jong Kim a formal complaint of inappropriate counseling

with the church; thereafter, a judicial complaint filed and drafted *by the church* followed which curiously omitted explicit details relayed by Wende and David C. during their interview.

2. On or about November 2, 2000, Wende C. and David C. filed a Summons with Complaint in the Monroe County Clerk's Office. On or about January 2001, pursuant to the formal complaint of inappropriate counseling filed with the Church, Pastor T. *admitted* to the inappropriate counseling relationship as charged.

Shortly after Pastor T. admitted to the sexual misconduct, he resigned from the ministry claiming to be suffering from marital problems, stress, and resumed counseling with a psychotherapist. (App. D-39a–49a).

B. The Proceedings Below

1. The Complaint

Petitioner's Complaint, dated October 20, 2000 was filed in the Monroe County Supreme Court on November 2, 2000.

2. United Methodist Church Motion for Summary Judgment

Respondent Conference and District Superintendent Dave Lubba moved for summary judgment seeking dismissal of the Complaint pursuant to New York Civil Procedure Laws and Rules §3212, thereby staying all disclosure and precluding the depositions of all relevant witnesses.

In support of their motion for summary judgment, the Respondents submitted the *sole affidavit* of its counsel, Jonathan Fellows, Esq. The affidavit of Mr. Fellows does not contain any facts demonstrating that he has personal knowledge of the counseling relationship between the Appellants and Pastor T. Mr. Fellows affidavit, in essence, simply outlines the specific allegations of Plaintiff's causes of action against

the defendants, and mischaracterizes the allegations set forth in the complaint as a "romantic affair" with "no cognizable claims under New York Law," and for which copies of e-mails between the parties substitutes as evidence that the "romantic relationship was mutual," and for which there is no "vicarious liability."

3. Petitioners' Opposition & Cross Motion for Summary Judgment against the Respondent Conference and Dave Lubba

Petitioners cross moved the Respondent Conference and the District Superintendent for Summary Judgment, relying on the sworn fact affidavits of Petitioners, along with affidavits of witnesses.

4. Petitioners' Motions for Summary Judgment Against Remaining Respondents Pastor T., Bishop Kim and Hosanna Junction

Petitioners then moved for summary judgment against the remaining Respondents, including Pastor T., Bishop Kim, and Hosanna Junction, relying on the same evidence put forth in its cross motion for summary judgment against Respondent Conference and the District Superintendent, including the sworn fact affidavits of the Petitioners.

5. Cross Motion for Summary Judgment by Respondents Bishop Kim and Hosanna Junction

Respondents Bishop Kim and Hosanna Junction then cross-moved for summary judgment against the Appellants. Respondent Pastor T. neither cross-moved for Summary Judgment nor responded to Appellant's motion for summary judgment.

6. The Supreme Court Order

A Memorandum Decision & Order was entered October 2, 2002. (App. A-1a–11a). Pastor T. did not respond to Petitioner's motion for summary judgment, nor to their appeal, and hence did not submit any evidence in admissible form to defend the motion. Not withstanding, Pastor T. was granted summary judgment *sua sponte.* (App. A-9a).

The remaining respondents were also granted summary judgment on the basis that the relationship between Pastor T. and Wende C. was nothing more than a "clandestine tryst." (App. A-7a), and that the remaining respondents had no notice of Pastor T.'s conduct, despite the fact that Bishop Kim received a letter from another congregant in or about December 13, 1999 expressing concern over the nature of the relationship between Pastor T. and Wende C.

The court dismissed the fiduciary duty claim holding that New York law did not recognize that relationship as existing between pastor and parishioner, and that the parties were not engaged in counseling when the alleged sexual battery occurred. (App. A-6a–7a).

7. The Appeal to the Supreme Court Fourth Department Appellate Division

Appellants filed its notice of appeal from Justice Siracuse's decision on October 17, 2002. By Decision and Order dated April 30, 2004, the Appellate Division affirmed the judgment of the trial court. (App. B-14a–20a).

A divided Appellate Division affirmed the judgment of the lower court. The three Judge Majority (Wisner, Hurlbutt, Kehoe., JJ.) ruled that Petitioners consented to the alleged unrebutted claims of sexual battery, that no cause of action for clergy malpractice exists, and further relied upon the principle of deference by civil authorities in ecclesiastical matters and held that the court should not adjudicate the

claims of whether Pastor T. breached his fiduciary duty to Petitioners, further setting forth that claims for negligent hiring were also precluded by the First Amendment. (App. B-14a–20a).

Dissenting Presiding Justice Piggott and Justice Scudder opined that Petitioners commenced her sexual battery claims, that numerous impermissible credibility determinations were made by the Supreme Court which were later ratified by the Majority regarding Wende C.'s consent to the sexual conduct, and while conceding that clergy malpractice claims are not cognizable, argued that the "neutral principles of law doctrine" be applied to the breach of fiduciary duty claims, further discerning that "while the existence of a clergy malpractice claim would depend on defining and evaluating a cleric's religious duty, a claim for breach of fiduciary duty depends only upon an evaluation of whether a relationship of trust and confidence exists and whether that trust and confidence has been abused." (App. B-22a–24a).

The Appellate Division ruled unanimously that Hosanna Junction sustained their burden on summary judgment; an Order was entered dismissing the appeal against Hosanna Junction. (App. B-27a–28a).

8. The Appeal to the New York State Court of Appeals

The Appellants submitted their Jurisdictional Statement on May 12, 2004. The Assistant Deputy Clerk of the Court, by letter dated May 18, 2004 confirmed that the Jurisdictional Statement had been received and reviewed.

Appellant respectfully submitted that the Court had jurisdiction under the provisions of §5601, subsection (a) of the Civil Practice Law and Rules in that two (2) Justices of the Appellate Division, Fourth Department, dissented in favor of appellant on issues of law.

By decision dated February 22, 2005, in an opinion by Judge Ciparick (Chief Judge Kaye and Judges Rosenblatt, Graffeo, Read and R.S. Smith, concurring), the Court of Appeals concluded that "[w]hile the complaint's brief reference to a "sacred trust" may arguably be couched as alluding to a fiduciary duty, the surrounding language and the allegations that follow sound in clergy malpractice, which would improperly require courts to examine ecclesiastical doctrine in an effort to determine the standard of care owed to parishioners undergoing ministerial counseling. (*see First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.*, 62 NY2d 110, 116 [1984] [providing that civil courts are forbidden from interfering in or determining religious disputes"]; see also *Md. v. Va. Eldership Churches of God at Sharpsburg, Inc.*, 396 US 367, 369 [1970] [Brennan, J. concurring]). (App. C-32a–33a).

Thus, the Court of Appeals in discerning no difference between allegations of clergy malpractice and breach of fiduciary duty, determined that the issue of pastoral sexual misconduct was in essence a "religious dispute" which they could not become entangled under the First Amendment because it would require inquiry into religious beliefs and practices. Further, the Court determined that the sexual relationship between Wende C. and Pastor T. was consensual as a matter of law. (App. C-32a).

Dissenting Justice Smith, concurring with the dissenters of the Supreme Court Fourth Department Appellate Division, disagreed that there is no "meaningful analytical distinction between a claim of breach of fiduciary duty and one for clergy malpractice" (App. C-35a) and pointed out that other states have concluded that an action for breach of fiduciary duty can be maintained when a pastor engages in an inappropriate sexual relationship during pastoral counseling, all without improperly involving the courts in ecclesiastical matters or dogma. (App. C-36a).

REASONS FOR ALLOWANCE OF THE WRIT

This Court should grant certiorari to resolve the circuit split on this critical and fully developed question of whether the First Amendment requires courts to examine ecclesiastical dogma in an effort to determine the standard of care owed to parishioners who undergo ministerial counseling which is central to the adjudication of secular torts against errant clergy.

Clergy sexual misconduct, from child abuse to adult parishioner affairs, permeates modern day society, and affects nearly every religious institution. The tort remedies available for clergy sexual abuse are limited to battery, breach of fiduciary duty, clergy malpractice, respondeat superior, negligent hiring and supervision, and negligent or intentional infliction of emotional distress. In recent years, clerical sexual misconduct and the resulting consequences from such misconduct continue to be the subject of fiercely disputed litigation with varying and inconsistent results.

There is a clear need for nationwide uniformity of law concerning the ability of victims to sue the church for the wrongs committed by its clergy. Most, if not all, of the conflict stems from the issue of whether the First Amendment bars claims for sexual misconduct against religious institutions. This issue has not been uniformly decided among jurisdictions. The split of authority nationwide is due primarily to the fact that the courts do not have any guidance.[2] The United States Supreme Court has not decided a seminal case, nor has Congress enacted a statute to address the issue of sexual misconduct by the clergy.

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[2] See *Prtizlaff v. Archdiocese of Milwaukee*, 533 N.W. 2d 780, 794 (Wis. 1995)("It is generally acknowledged that this area of First Amendment law is in flux and the United States Supreme Court cases offer very limited guidance.") (Abrahamson, J. Dissenting).

Because this area of First Amendment law is in flux, a conflict has arisen which is often in direct contradiction to modern day First Amendment jurisprudence. Some courts perfunctorily decide that claims for breaches of fiduciary duty are in fact claims for clergy malpractice, and refuse adjudication of the matter as the claim, characterized as either breach of fiduciary duty or clergy malpractice, would entangle the court in "forbidden ecclesiastical terrain."[3] Several other courts have addressed the issue of clergy malpractice, none explicitly recognizing it as a cause of action.[4]

Among these courts, there is a split of authority regarding whether these claims are permissible under the First Amendment. Some courts have ruled that submitting the clergy-congregant sexual misconduct issue to the civil courts violates church-state separation.[5] Some courts have taken precisely the opposite view and have suggested that fiduciary liability, as well as liability for clergy malpractice, may arise

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[3] *Langford v. Roman Catholic Diocese*, 705 N.Y.S. 2d 661, 662 (App. Div. 2000); see also *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991).

[4] See e.g. *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994); *Isley v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991); *F.G. McDonnell*, 696 A.2d 697 (N.J. 1997)(holding that clergy malpractice was an inappropriate form of relief for sexual misconduct); *Moses v. Diocese of Colo.* 863 P.2d 310 (Colo. 1993); *Schieffer v. Catholic Archdiocese*, 508 N.W. 2d 907 (Neb. 1993); *Byrd v. Faber*, 565 N.E. 2d 584 (Ohio 1991); *Destefano v. Grabian*, 763 P.2d 275 (Colo. 1988)(en banc); *Strock v. Pressnell*, 527 N.E, 2d 1235 (Ohio 1988); *Handley v. Richards*, 518 So. 2d 682 (Ala. 1987); *Amato v. Greenquist*, 679 N.E. 2d 446 (Ill. App. Ct. 1997); *Hester v. Barnett*, 723 S.W. 2d 544 (Mo. Ct. App. 1987); *Doe v. Roman Catholic Diocese*, 862 S.W. 2d 338 (Mo. 1993) (en banc); *Bladen v. First Presbyterian Church of Sallisaw*, 857 P.2d 789 (Okla. 1993); *Jones v. Trane*, 591 N.Y.S.2d 927 (Sup. Ct. 1992); *E.J.M. v. Archdiocese of Phila.*, 622 A. 2d 1388 (Pa. Super. Ct. 1993). But see *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998)(characterizing the action as one for professional malpractice for marital counseling).

[5] These cases are discussed *infra*, in Section I. C.

from the religious quality of the clergy-congregant relationship.[6] Nonetheless, the outcomes of the respective jurisdictions are dependent solely on whether the court perfunctorily characterizes the claim as one for breach of fiduciary duty or malpractice.[7]

The split among the jurisdictions that have ruled on whether the First Amendment bars these claims against a religious institution requires resolution. Nearly fifteen years ago the concept of clergy malpractice was introduced in *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948 (Cal. 1988). Since then, there has been an epidemic of tort actions against the church and clergy, due in part to a heightened awareness of victim status, and the public belief that the church should not mistreat victims.

Review by this Court is necessary to address an important issue posed by the Court of Appeals' decision. First, contrary to this Court's prior assumptions and the holdings of other courts — including prior holdings of the Second Circuit[8] — the Court of Appeals failed to apply the neutral principles of law doctrine when it determined that it could not adjudicate the sexual misconduct claims due to fear of excessive

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[6] *F.G. v MacDonnell*, 696 A.2d 697 (N.J. 1997)(allowing a sexual misconduct claim against a cleric based upon a breach of fiduciary duty).

[7](See e.g. *Jones v. Trane*, 153 Misc. 2d 822, 501 N.Y.S. 2d 927, 1992 N.Y. Misc. LEXIS 547; *Doe v. Evans*, 718 So. 2d 286, 1998 Fla. App. LEXIS 11438, 23 Fla. L.Weekly D 2077 14 I.E.R. Cas (BNA) 577, 137 Lab. Cas. (CCH) P 58516 (Fla. Dist. Ct. App, 4th Dist. 1998) (marital counseling); *Destafano v. Grabian*, 763 P.2d 275 (marital counseling); *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1173 (marital counseling); *Moses v. Diocese of Colorado*, 863 P.2d 310, 316 (family counseling); *Erickson v. Christenson* 781 P.2d 383, 384 (counseling relationship).

[8]*Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F. 3d 409 (2d Cir. 1999); see also *Jones v. Trane,* 153 Misc.2d 822, 501 N.Y.S. 2d 927, 1992 N.Y. Misc. LEXIS 547.

entanglement with the church in violation of the First Amendment. The Court of Appeals' disregard for the neutral principles of law doctrine is in considerable tension with current First Amendment jurisprudence. Review of this case is essential to decide whether cases such as this, involving claims of clergy sexual misconduct, are barred by the First Amendment, a view contrary to the current narrow interpretation of the Establishment Clause.

Review by this Court is necessary to continue the vitality of the abstention doctrine. When applying Supreme Court precedent concerning the limited judicial abstention doctrine, it is evident that the doctrine is inapplicable in sex abuse cases. The Supreme Court has uniformly concluded that the First Amendment was never intended to prohibit state action for the punishment of acts which are inconsistent with the morals of society.[9] The abstention doctrine, as it has been consistently interpreted by the Supreme Court, does not grant constitutional immunity to churches for the harm caused by their secular torts.

In addition, the ramifications of the Court of Appeals' decision is significant. The duties assumed by the clergy are of enormous magnitude to those vulnerable victims to whom a duty is owed. The resistance to adjudicate matters where religion is not the gravamen of the case has permitted sexual predators total shelter from tort laws that could deter and limit their behavior. While the constitutional tradition of avoiding governmental interference with the practice of religion is an important consideration, the regulation of sexually predatory conduct is also an important policy consideration.

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[9] *Bob Jones Univ. v. United States*, 461 U.S. 574, (1983); *United States v. Lee*, 455 U.S. 252 (1982); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Davis v. Beason*, 133 U.S. 333 (1890).

The reluctance to tackle the constitutional issues necessary to define a standard of care for clergy counseling appears to be the primary stumbling block to successfully stating a cause of action for judicial recognition of both clergy malpractice and breach of fiduciary duty. An undeserved sense of traditional privilege has evolved and has permitted religious institutions to assert First Amendment claims, even where undesired results occur.

Left undisturbed, the decision of the Court of Appeals will affect the ability of courts to delineate ostensible religious behavior from tortious, secular behavior, permitting errant clergy to continue to shield themselves from liability by invoking the First Amendment when they induce parishioners to engage in otherwise inappropriate sexual conduct during pastoral counseling.

Construing the constitutional guarantee of religious freedom to protect secular beliefs and actions would impermissibly situate religious leaders in preferred standing in our community. In this light, there are several policy objectives which require review by the Supreme Court. First, interpretation of the First Amendment so as not to bar these claims would not prejudice or impose upon the religious tenets or doctrines of faith of any religion. Second, permitting these claims to proceed to trial will put the public on notice of this type of potential risk. Third, common law prohibitions of sexual misconduct by fiduciaries and professionals should be considered a generally applicable law. Exceptions for religious institutions counter common sense and social expectations imbedded in the fiduciary/professional relationships. Any such exception would allow the First Amendment to be used as a pretextual shield to protect otherwise prohibited conduct.

The Court's review is accordingly warranted.

I. The Court Of Appeals' Decision Conflicts With The Decisions of Numerous Courts Nationwide On A Critical And Fully-Developed Issue Of First Amendment Interpretation Affecting the Rights of Victims of Errant Clergy Nationwide

A. The Decision Below Runs Afoul of The Neutral Principles of Law Doctrine Established by This Court In Jones v. Wolf

The Supreme Court in *Jones v. Wolf, supra*, formulated the "neutral principles" approach for determining whether a court is excessively entangled in religion. While the dispute in that case was regarding real property rather than state court claims, the Court, nevertheless, was presented with the issue of whether civil courts could resolve the dispute on the basis of neutral principles of law, or whether they must defer to the resolution of an authoritative tribunal. The Supreme Court determined that if an issue of wholly secular in operation, a court may apply neutral principles of law. If, however, resolution is rooted in deeply held religious doctrine, then a court must defer the matter to the appropriate religious entity. Provided that the court does not inquire into any substantive ecclesiastical doctrine, civil courts can adjudicate these matters by applying the neutral principles of law doctrine.

The Court of Appeals' decision that claims of sexual misconduct, either as a breach of fiduciary duty or as clergy malpractice cannot be examined because it would improperly require courts to examine ecclesiastical doctrine in an effort to determine the standard of care owed to parishioners undergoing ministerial counseling runs counter to this Court's holding in *Jones v. Wolf, supra*, and its progeny, and to the considerations of modern day First Amendment jurisprudence which favors a narrow reading of the First Amendment.

Indeed, the Supreme Court in *Employment Div. Dept. Of Oregon v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 1599, 108 L.Ed. 2d 876, 884 (1990), this Court held that the state may prohibit conduct through generally applicable laws as long as such prohibitions are not specifically directed at religious practice. First Amendment exemption from neutral tort law cannot be sought "on the ground that the law proscribed (or prescribes) conduct that religion prescribed (or proscribes)."

The objective of subjecting the clergy to tort law to prevent sexual misconduct in the counseling forum is not directed at any one religion or only at religion but is consistent with this Court's holding in *Employment Div. Dept. Of Oregon* in which this Court determined that the Free Exercise clause guarantees the "freedom to believe and freedom to act. . . The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (*Cantwell v. State of Connecticut*, 310 U.S. 296, 303-304, 60 S. Ct. 900, 903, 84 L.Ed 1213, 1218, 128 A.L.R. 1352 (1940)).

While it is well settled that only ecclesiastical or theological questions, or questions which seek to challenge the formal judgments of church tribunals, are beyond the reach of civil adjudication regarding the First Amendment, once a court determines that the nature of the dispute involving a religious defendant is a secular one, the court can resolve the dispute through neutral principles of law. Indeed, this Court has routinely adjudicated matters of conduct specific to a particular religion,[10] unfettered by the First Amendment.

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[10] *United States v. Lee*, 455 U.S. 252, 261 (1982); *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.* 452 U.S. 640, 655-56 (1981); *Gillette v. United States*, 401 U.S. 437, 462-63 (1971).

Since sexual exploitation and the breach of trust that occurs when the clergy engages in such conduct during ministerial counseling is a secular matter that can be resolved using neutral principles of law, courts need not dwell on ecclesiastical dogma. Indeed, the abuse of power within the clergy-counselee relation is very unlikely to be the result of any deeply held religious belief that would be compromised by the exercise of jurisdiction.

B. The Decision Below Conflicts With The Decision of This Court That The Judicial Abstention Doctrine Is Not Applicable Where the Dispute May Be Resolved By Application of Neutral Principles of Law

The limited scope of the judicial abstention doctrine, even in intra-church dispute cases, as established in *Watson v. Jones*, 80 U.S. 679, 727 (1871), has been firmly established by the Supreme Court.[11]

In *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.* 396 U.S. 367 (1970), on which the Court of Appeals relies in its decision below, the Supreme Court was asked to determine which of the factions of the church should control the local churches and their property. The Court affirmed that the judicial abstention doctrine was not applicable where the dispute may be decided by applications of "neutral principles of law." (See id, at 370 (Brennan, Marshall, J., concurring).

The limitation of the scope of the judicial abstention doctrine was later visited in *General Council on Finance and Administration of the United Methodist Church v. Superior*

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[11] See e.g. *Serbian v. Orthodox Dioces v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929).

Court of California, 439 U.S. 1355, 1369 (1978), where the Church challenged a California state court's jurisdiction to hear a dispute arising out of damage claims for breach of contract, fraud, and violations of state security laws. Chief Justice Rehnquist ruled, in accordance with established precedent, that "there are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra church disputes," but nonetheless determined that "this Court never has suggested that those constraints similarly apply outside the context of such intra organization disputes." (*Id.* at 1372-73).

The Court of Appeals' holding that it cannot examine claims for breach of fiduciary duty or clergy malpractice would improperly require courts to examine ecclesiastical doctrine in an effort to determine the standard of due care owned to parishioners undergoing ministerial counseling runs counter to the essential presumption that the abstention doctrine, as consistently interpreted by the Supreme Court, simply does not grant constitutional immunity to churches for the harm caused by their secular torts, to the Court's holding in *Watson*, and to the well settled principle that the Supreme Court has consistently concluded that the First Amendment was never intended to prohibit state action for the punishment of acts that are contrary to the peace, good order, and morals of society.

C. The Decision Below Conflicts With Courts Nationwide that Have Refused to Permit The First Amendment To Be Invoked As A Defense To Otherwise Secular Torts

The decision below conflicts not only with *Maryland and Virginia Eldership of the Churches of God*, *supra*, but with prior Federal circuit courts of appeal decisions which are in accord with the proposition that the First Amendment is not a bar to claims of pastoral sexual misconduct. In *Bollard v.*

Cal Province of the Soc'y of Jesus, 196 F. 3d 940, 947-48 (9th Cir. 1999) the court stated "because there is no protected-choice rationale at issue, we intrude no further on church autonomy in allowing this [sexual harassment] case to proceed than we do, for example, in allowing parishioners' civil suits against a church for the negligent supervision of ministers who have subjected them to inappropriate sexual behavior." *Id. See also Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F. 3d 409 (2d Cir. 1999); *Sander v. Casa View Baptist Church*, 134 F. 3d 331 (5th Cir 1998).

In failing to apply the neutral principles of law doctrine, the Court of Appeals failed to determine the nature of the dispute when it perfunctorily claimed that there is no distinction between claims for clergy malpractice and breach of fiduciary duty. Such an argument, however, ignores the fact that recovery under a fiduciary theory depends on an entirely different burden of proof than that for claims of clergy malpractice.

To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate that a fiduciary relationship arose by virtue of the plaintiff having "trusted and sought counseling from a pastor," and in turn, that pastor having violated that trust, and not upon any particular standard of care which would implicate church doctrine of establish a professional standard of care. (*See Restatement [Second] of Torts* § 874, Comment a.) One Court has noted:

> "The fundamental difference between the two causes of action is the former is a breach of trust and does not require a professional relationship or a professional standard of care, while the latter is an action for negligence based on a professional relationship and a professional standard of care. In *Destefano*, we held that defendant owed a fiduciary duty to the plaintiff that was

created by his undertaking to counsel [the plaintiff]." *Moses v. Diocese of Colorado*, 863 P.2d 310 quoting *Destefano v. Grabian*, 763 P.2d 275, 284 (Colo. 1988).

New York courts further recognize that "[a] fiduciary relationship only arises when one has reposed trust and confidence in the integrity and fidelity of another who thereby gains influence or assumes control and responsibility." Trust and confidence are vital to the counseling relationship between parishioner and pastor. By accepting a parishioner for counseling, a pastor also accepts the responsibility of a fiduciary; it is well settled that one standing in a position of trust is liable for harm resulting from a breach of the duty imposed by that position. (*See Restatement (Second) of Torts* § 874 (1979)).

In this light, decision below conflicts with the holdings of courts *within* the Second Circuit that have decided that the First Amendment is not a bar to determining whether a fiduciary duty had been breached. *See Jones v. Trane* 153 Misc. 2d 822, 501 N.Y.S. 2d 927, 1992 N.Y. Misc. LEXIS 547; *see also Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 414 (2d Cir. 1999).

The decision below also conflicts with jurisdictions outside of New York have defined fiduciary relationships broadly[12],

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[12] Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice and Sexual Abuse by Clergy*, 8 *Mich. J. Gender & L.* 45 (2001) Footnote 79, citing *State ex rel Harris v. Gautier*, 147 So. 240, 242 (Fla. 1933) ("the term fiduciary or confidential relations is a very broad one, and embraces both technical fiduciary relations and those informal relations which exist whenever one man trust in or relies upon another."); *Higgins v. Chicago Title & Trust Co.*, 143 N.E. 482, 484 (Ill. 1924) ("A fiduciary relation is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and child, or other recognized legal relations, but it exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. It may be moral, social, domestic, or merely personal. If the confidence in fact exists, is reposed by one party and accepted by the

and have upheld actions imposing a fiduciary duty on an adult pastor for sexual misconduct with an adult parishioner, but which the Court of Appeals failed to consider. (See *F.G. MacDonell*, 150 N.J. 550, 696 A.2d 697, 701-702 (pastoral counseling) *Doe v. Evans*, 718 So. 2d 286, 1998 Fla. App. LEXIS 11438, 23 Fla. L.Weekly D 2077 14 I.E.R. Cas (BNA) 577, 137 Lab. Cas. (CCH) P 58516 (Fla. Dist. Ct. App, 4th Dist. 1998) (marital counseling); *Destafano v. Grabian*, 763 P.2d 275 (marital counseling); *Sanders v. Casa View Baptist Church*, 136 F.3d 331, 336-337, cert denied 525 U.S. 868, 119 S.Ct. 161, 142 L.Ed 2d 132) (marital counseling); *Moses v. Diocese of Colorado*, 863 P.2d 310, 316 (family counseling); *Erickson v. Christenson* 781 P.2d 383, 384 (counseling relationship).

Two distinctions emerge from these decisions that conflict with the decision below. First, the Free Exercise Clause should be considered only when one is acting in accord with deeply held religious beliefs. Because the behavior in *F.G. MacDonell*, *Moses*, *Destafano,* and *Erickson*, not unlike the behavior in the instant matter, fell *outside* any deeply held religious belief, the courts in those matters would not allow the Free Exercise Clause to be used as a shield by errant clergy. The second distinction is that a clergy member stands in the position of a fiduciary, and should be held liable when he breaches his fiduciary duty.

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other, the relation is fiduciary, and equity will regard dealings between the parties according to the rules which apply to such relation."); *Eldridge v. May*, 150 A. 378, 379 (Me. 1930) ("The term fiduciary or confidential relation . . . is a very broad one. It embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The relations and duties involved in it . . . may be moral, social, domestic or merely personal." *Adams v. Moore*, 385 S.E. 2d 799, 801 (N.C. Ct. App. 1989) ([A] fiduciary relationship can be found to exist anytime one person reposes a special confidence in another).

Here, however, the Court of Appeals reached a contrary conclusion when it failed to apply the neutral principles of law doctrine when it deemed Pastor T.'s conduct as part of the forbidden ecclesiastical terrain upon which civil courts are "forbidden" from traversing.

To restate the rhetorical question: If the leaders of non-religious voluntary associations are deemed to stand in fiduciary relationships with adult members of their associations, why should the law treat religious leaders differently? The answer is that it should not. Privilege and exemption from secular tort law should not come in the back door. The jurisdictional argument raised by the First Amendment is not compelling; in the case of the clergy-congregant sexual misconduct issue, the Respondents have not met their burden in demonstrating a compelling interest. Sexual misconduct by religious leaders with the people they counsel should lead to no more, and no less, liability than sexual misconduct by any nonreligious leader.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

Appendix A

Memorandum Decision of the State of New York Supreme Court: County of Monroe, Dated and Filed August 26, 2002

State of New York
Supreme Court: County of Monroe

Wende Cleary and her spouse David Cleary,

Plaintiffs,

-against-

Index No. 2000/12263

The United Methodist Church, New York West Area; The Western New York Conference of the United Methodist Church; Dr. G. Charles Ten Eyck, individually and in his capacity as pastor of the Hosanna Junction United Methodist Church; Hae-Jong Kim, Resident Bishop, the United Methodist Church, New York West Area,

Defendants.

APPEARANCES:

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Appendix A

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MEMORANDUM DECISION

ANDREW V. SIRACUSE, J.

A sexual relationship between a Methodist minister and a married parishioner is the stuff of scandal, but it is not necessarily the basis for a law suit. In general, the rule remains that sexual matters between consenting adults give rise to no cause of action, whatever the surrounding circumstances. There is, however, an increasingly noticeable trend in the case law to permit recovery in situations in which one party is peculiarly vulnerable to the other. In one of the best-known of such fact patterns, the sexual exploitation of patients by psychiatrists or other therapists, the legal theory is that of professional malpractice.

When the plaintiff is merely a member of the defendant's congregation, courts have seen no difficulty in applying the general rule barring actions as a result of a consensual relationship. Results differ, though, when the plaintiff is receiving private counselling from the defendant, an increasing part of the work of the clergy in all denominations.

Reasoning that such counselling is analogous to sessions with a psychologist, some attorneys have proposed a theory of clergy malpractice. No court has accepted this approach (*see, e.g., Schmidt v Bishop, et al*, 779 F Supp 321, 328 [SDNY 1991]). In several cases, however, the minister has been held liable for breach of a fiduciary duty (*see, e.g., Doe v Evans et al.*, 814 So2d 370 [S Ct Fla 2002]; *F.G. v MacDonell et al.*, 150 NJ 550, 696 A2d 697 [S Ct NJ 1997]).

This is not the law in New York, where such conduct is treated as the intentional tort of sexual abuse. In *Langford v Roman Catholic Diocese of Brooklyn, et al.* (271 AD2d 494), for example, the plaintiff sued under theories of breach of fiduciary duty, negligent and intentional infliction of emotional distress and battery, among others. The Second Department, in dismissing the complaint as time barred, stated

> Regardless of how they were pleaded, these causes of action sought to recover damages for the unwelcome, intentional conduct by [defendant] and were thus governed by a one-year Statute of Limitations (271 AD2d, at 495).

Similar language can be found in the Fourth Department case of *Sharon B. v Reverend S. et al.* (244 AD2d 878).

Unwelcome sexual contact requires, of course, that the plaintiff not consent. In the present case, as in all cited ones, the plaintiff did agree to the contact, either verbally or through conduct. It is necessary, then, for a court to find that the counselling relationship was so unequal that the plaintiff was factually incapable of consenting to sexual activity. This requires something beyond mere participation in therapy. Not every type of counselling has the potential for undermining those elements of self-awareness, self-confidence and conscious control that together support our sense that, in general, people properly bear the consequences for the decisions they make.

Appendix A

In addition, it is clear that the parishes, dioceses, and governing bodies of the institutions that employ individual clergy defendants are not liable for their acts under a theory of respondeat superior, as sexual abuse is not within the scope of a clergyman's employment — something of a massive understatement (*Paul J.H. v Lum et al.*, 291 AD2d 894, 895). If these institutional defendants have had notice of the individual tortfeasor's propensities, however, they may be sued for negligent hiring, training, retention and supervision (*loc. cit.*).

With these principles in mind, the court now turns to the facts. All parties but the Rev. Ten Eyck have moved for summary judgment, and in weighing the defendants' motions the plaintiffs are entitled to every positive inference that can be drawn from the record. Unfortunately for the plaintiffs, however, their own papers are internally inconsistent. Certain documents claim that the relationship between Rev. Ten Eyck and Mrs. Cleary ended in February 1999, which would make the present action — commenced in November 2000 — time barred. Others state that it ended a year later, when Mr. Cleary first uncovered evidence of the affair. This discrepancy is especially important because the plaintiffs must establish that Rev. Ten Eyck and Mrs. Cleary were in a counselling relationship during the alleged abuse, and that the relationship was such as would conceivably vitiate her consent.

The plaintiffs have failed to show this. In addition they have failed to establish that the institutional defendants had any notice of either the sexual relationship or Rev. Ten Eyck's supposed propensity to seduce female parishioners. The key elements of their case are without evidentiary support.

Wende Cleary's affidavit contains 189 numbered paragraphs and is accompanied by dozens of exhibits. (Many of the exhibits deal with a different matter entirely and are apparently appended so the court might be aware of how the church had handled similar matters.) She states that she

engaged in counselling with Rev. Ten Eyck from January 27, 1999 to February 7, 2000, and that from October 1999 until February 7, 2000, he engaged her "in inappropriate conduct during our counselling relationship."

Of the inappropriateness of the conduct there is no doubt; the two were involved in an adulterous sexual relationship. What Mrs. Cleary fails to show is that the adultery coincided with the counselling. Her own statements and the exhibits attached show that the counselling relationship ended in April, 1999. The character of the relationship as it developed beginning in October of that year was quite different; rather than acting as an advisor and therapist, Rev. Ten Eyck presented himself as a vulnerable man completely smitten with Mrs. Cleary's charm, and his e-mail messages to her contain not advice but passionate avowals of devotion and undying love.

It does appear that Mrs. Cleary and Rev. Ten Eyck first met in the context of counselling. Wende Cleary was certainly troubled; she suffered from bulimia and was taking anti-depressant medications. In January 1999 the minister gave her a leaflet advertising his credentials and expertise in counselling. In February, 1999, he had her complete something called a gene-o-gram, a kind of narrative family tree detailing stress-producing events in her family's past.

It is also clear that Rev. Ten Eyck's conversation was very personal in these early sessions, but Mrs. Cleary's narration shows nothing that could be considered improper except perhaps in retrospect. She herself began to feel attracted to Rev. Ten Eyck, and decided to stop the counselling. After a few more meetings, during which Rev. Ten Eyck admitted romantic feelings towards the plaintiff and at least once kissed her on the lips, the two stopped seeing each other. Mrs. Cleary, upset by the attention and the unwelcome kiss, ignored him for several months.

The kiss was of course a battery, at least nominally; but it was also more than a year before the summons and complaint in this action was filed, and can no longer form the basis for a law suit. Nor does the plaintiff allege any sexual contact during this period. The affair itself arose more than six months later.

From September 1999 Rev. Ten Eyck began what looks like a deliberate campaign of seduction. Mrs. Cleary states that he came to visit her repeatedly, and at what she called a counselling session he told her that he could no longer contain his feelings for her. The sexual part of the relationship began then.

The two met repeatedly for what Mrs. Cleary consistently calls counselling sessions. Rev. Ten Eyck took her hand and played songs for her in church, met her in restaurants, and they engaged in hurried sexual encounters in his car. He told her of his unhappy marriage, described the happiness they would feel as husband and wife, told her God wanted her to be happy and that her husband could never make her so, and more.

The character of this relationship is revealed in far more detail than one might like in the e-mail messages preserved by plaintiff. (These are not dated with the year, but at oral argument plaintiffs' counsel stated that they were sent in February 2000.) The selection reproduced in the record was prepared by Mrs. Cleary to distribute to some friends to show "that our relationship has been very mutual." Both parties send endearments and share fantasies with each other; nothing suggests anything other than mutual fascination and vulnerability. Mrs. Cleary describes herself as initially offended and guilt-stricken by her pastor's attentions, but on the strength of the e-mail messages this reaction did not last.

Nothing in the record raises a question of fact that this apparent mutuality was vitiated by a counselling relationship. There is no evidence at all that Mrs. Cleary counselled with her minister during this period. Merely calling each meeting a counselling session is inadequate; one cannot convert clandestine trysts into psychological counselling by labelling alone. The only evidentiary fact to which plaintiffs point that gives any support to their contention is the supposed administration of a "Meyer Briggs" test on February 6, 2000. However, a message which Mrs. Cleary dates February 5 (in which she is quoted as telling Rev. Ten Eyck that he was the love of her life) shows that the minister took this test himself, identifying his psychological type as "ENTP". There is no unequivocal proof other than the plaintiff's affidavit that she took the test herself, and she does not mention Rev. Ten Eyck's having done so. The record, then, suggests at most that the Meyer Briggs test was part of a mutual exploration of personality rather than a tool in a therapeutic relationship.

The remaining unquestionable fact in this case is that on February 8, 2000, Mr. Cleary discovered some of the e-mail messages on the family computer, and confronted his wife with the evidence of an affair. It was not until some time later, after discussions with her own psychologist, that Mrs. Cleary "discovered that [she] had been sexually and emotionally exploited by Pastor Ten Eyck, and *** had grown emotionally dependent upon him." The Clearys then filed a complaint with the church.

This complaint, exhibit B, is significantly inconsistent with the rest of the plaintiffs' papers. It was sent to Bishop Kim on or about September 22, 2000. The formal judicial complaint prepared by church counsel James Pollard was necessarily dependent on the Clearys' accounts, because they are the only ones listed as complainants; and that document, plaintiff's exhibit FF, states that the relationship (which is not

therein described as sexual) ended on April 21, 1999. Nothing in either exhibit suggests any connection between the two after that date.

It is not clear why the plaintiffs failed to inform the church of the sexual relationship that followed. Whether this lack of candor is connected with the fact that Mrs. Cleary circulated selected e-mail messages to some of her friends with the year of transmission omitted is also unclear, but the inconsistency makes her present contentions even more dubious than they might be otherwise.

Rev. Ten Eyck admitted the affair, ascribing his poor judgment and violation of his duties to his own marital problems. He eventually resigned the ministry, and upon his resignation the church terminated disciplinary proceedings.

It is a truism that summary judgment puts all parties to their proof. While the evidence provided by plaintiffs must be credited in weighing the defendants' motions, it must also be remembered that a party's choice of terminology is not in itself evidence. Just as one cannot prove the existence of a contract by assertions alone (*see, e.g., Kosson v Joshua*, 203 AD2d 112, 113-113), it is also impossible to establish a counselling relationship by the cumulative assertions contained in plaintiff's affidavit. No question of fact as to any such relationship exists. Pastor Ten Eyck's habit of counselling congregants in public places is exhaustively proved, but one cannot reason from this fact to the conclusion that all meetings in public places were therefore counselling sessions.

Whatever counselling took place between the parties ended in the spring of 1999, and no one could mistake Rev. Ten Eyck's pursuit of Mrs. Cleary from the fall of that year on to be anything other than romantically motivated. As passages in Mrs. Cleary's affidavit imply, "counselling" was a convenient cover story should the two be seen together. The court

gives it no more weight. Indeed, it seems that for some time Mrs. Cleary thought of the relationship as honestly-felt and reciprocal. It was not until months afterwards that she "discovered", with the aid of a psychologist, that she had been exploited by Rev. Ten Eyck. There is no way to tell if this interpretation, which absolves Mrs. Cleary of blame, is accurate; the pastor's protestations of love may in fact have sincere, and a very different conclusion might have come about had Mr. Cleary not discovered the affair in February. The tardiness of that "discovery", though, is further support for the conclusion that the relationship was at least outwardly mutual.

The record shows, therefore, that no triable question of fact exists as to the character of the relationship here. However reprehensible Rev. Ten Eyck's conduct may be, it was not such as would raise the implication that Mrs. Cleary was incapable of consent. His knowledge of her prior psychological issues do not alter this conclusion. The presumption that adults are capable of granting and withholding consent to sexual relationships is not overcome by the evidence here presented.

Although Rev. Ten Eyck has not moved for summary judgment himself, summary judgment motions search the record, and judgment may be granted to a non-moving party (CPLR 3212[b]; *Merritt Hill Vineyards v Windy Heights Vineyards*, 61 NY2d 106). The court grants it to Rev. Ten Eyck, and the complaint is dismissed as against him.

The remaining defendants all argue that they are not liable because Rev. Ten Eyck committed no tort. But this would be the rule only if the action proceeded on a theory of respondeat superior, and as noted above this theory has been rejected in cases of sexual abuse. There are other valid defenses raised by these parties, though, and the complaint should be dismissed against them as well.

Notice, of course, is an indispensable part of any action for negligent hiring, retention, or supervision. The plaintiffs have shown no notice. They point to a letter that was sent to defendant Lubba on December 13, 1999, and even complain that the church's internal investigation did not include speaking to the plaintiffs. The court cannot see, though, why the church hierarchy would be expected to speak to the plaintiffs following this letter, because it deals with other parishioners and with matters far removed from this relationship. If the plaintiffs are referred to in this letter they are never mentioned by name.

Hearsay allegations, especially in plaintiff David Cleary's papers, claim that the Rev. Ten Eyck had admitted an improper relationship to other parishioners, that parishioners told Mr. Cleary about it, and that the church should have known about these matters. Such statements are obviously insufficient to support or respond to a summary judgment motion, and the plaintiffs — who are offended by the use of an attorney's affirmation from defendant — should certainly know this. Defendant Lubba, on the other hand, has presented a sworn affidavit stating that he had no knowledge whatsoever of Rev. Ten Eyck's conduct until after the relationship with the plaintiff had ended. Bishop Kim has provided a similar affidavit.

The case of defendant Hosanna Junction is even more clear, because according to the structure of the Methodist church individual churches have no right to hire, fire, or discipline their ministers. Thus, Hosanna Junction would have been unable to take any action with respect to Rev. Ten Eyck's conduct even had that body known about it.

In short, no cause of action can be shown against any of the defendants. Rev. Ten Eyck has destroyed his ministry and his reputation, but has committed no actionable tort. The institutional defendants, while they hired and promoted

him, cannot be shown to have had notice of any improper tendencies that would render them liable. Mr. Fellows may prepare an order dismissing the complaint, without costs or disbursements.

DATED: Rochester, New York
August 26, 2002

/s/
Andrew V. Siracuse, J.S.C.

Appendix B

Memorandum and Order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, Dated and Filed April 30, 2004

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

139
CA 03-01335

PRESENT: PIGOTT, JR., P.J., WISNER, HURLBUTT, SCUDDER, AND KEHOE, JJ.

MEMORANDUM AND ORDER

WENDE C. AND DAVID C., PLAINTIFFS-APPELLANTS,

V

UNITED METHODIST CHURCH, NEW YORK WEST AREA,

DEFENDANT,

WESTERN NEW YORK CONFERENCE OF UNITED METHODIST CHURCH, DR. G. CHARLES T., INDIVIDUALLY AND IN HIS CAPACITY AS PASTOR OF HOSANNA JUNCTION UNITED METHODIST CHURCH, HAE-JONG KIM, RESIDENT BISHOP, UNITED METHODIST CHURCH, NEW YORK WEST AREA, AND DAVID LUBBA, DISTRICT SUPERINTENDENT, ROCHESTER DISTRICT, UNITED METHODIST CHURCH,
DEFENDANTS-RESPONDENTS.

Appendix B

CHRISTINA A. AGOLA, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WESTERN NEW YORK CONFERENCE OF UNITED METHODIST CHURCH AND DAVID LUBBA, DISTRICT SUPERINTENDENT, ROCHESTER DISTRICT, UNITED METHODIST CHURCH.

TREVETT, LENWEAVER & SALZER, P.C., ROCHESTER (JAMES C. GOCKER OF COUNSEL), FOR DEFENDANT-RESPONDENT HAE-JONG KIM, RESIDENT BISHOP, UNITED METHODIST CHURCH, NEW YORK WEST AREA.

WOLFORD & LECLAIR LLP, ROCHESTER (LAURIE A. GIORDANO OF COUNSEL), FOR DEFENDANT - RESPONDENT HOSANNA JUNCTION UNITED METHODIST CHURCH.

Appeal from an order of the Supreme Court, Monroe County (Andrew V. Siracuse, J.), entered October 2, 2002. The order dismissed the complaint and denied plaintiffs' motions and cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from be and the same hereby is affirmed without costs.

Memorandum: Plaintiffs commenced this action against defendants, including the pastor of their former church and various ecclesiastical entities and officials, seeking to recover punitive damages as well as compensatory damages for pain and suffering and mental anguish allegedly sustained as a result of an adulterous relationship between plaintiff Wende C. and the pastor, defendant Dr. G. Charles T. (defendant T.). Wende C. and her husband, plaintiff David C., allegedly were

receiving pastoral counseling at the time of the sexual relationship. Supreme Court properly denied plaintiffs' motions and cross motion for summary judgment, searched the record and granted summary judgment sua sponte to defendant T. dismissing the complaint against him.

With regard to the first cause of action, alleging sexual battery, we note that all of the explicit allegations of lack of consent on the part of Wende C. relate to incidents of touching that occurred more than one year prior to commencement of the action. With regard to those incidents of intentional touching, therefore, the court properly dismissed that cause of action as time-barred (*see* CPLR 215 [3]; *Hart v Child's Nursing Home Co.*, 298 AD2d 721, 722; *Sharon B. v Reverend S.*, 244 AD2d 878, 879; *Doe v Roe*, 192 AD2d 1089, 1090). With regard to those incidents of touching that occurred within one year of commencement of the action, we discern no explicit allegations nor any evidence indicative of lack of consent. Instead, the evidence in this record, including the averments of Wende C. and her contemporaneous e-mails and letters, establishes as a matter of law that the romantic attachment was mutual and the sexual contact consensual on the part of Wende C. (*see Sanders v Rosen*, 159 Misc 2d 563, 576, citing *Coopersmith v Gold*, 172 AD2d 982, 984). Our conclusion on the issue of defendant T.'s liability for battery with regard to the most recent incidents would of course be different if force were alleged or if Wende C. suffered from some legal disability, such as infancy, mental impairment, or physical helplessness, precluding a consensual sexual relationship (*see generally Jeffreys v Griffin*, 1 NY3d 34, 41 n 2, citing PJI2d 3:3 [2003]). No such disability is even arguably present here, and we cannot find one based on the existence of a counseling relationship.

The court further properly granted defendant T. summary judgment dismissing the cause of action for intentional infliction of emotional distress against him. The conduct alleged

was not so "extreme and outrageous" as to "go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303, quoting Restatement [Second] of Torts § 46, Comment *d*; *see Lightman v Flaum*, 278 AD2d 373, 374, *affd* 97 NY2d 128, *cert denied* 535 US 1096; *see generally Howell v New York Post Co.*, 81 NY2d 115, 121; *Freihofer v Hearst Corp.*, 65 NY2d 135, 143).

The court also properly granted defendant T. summary judgment dismissing the cause of action for clergy malpractice against him. No such cause of action is cognizable in New York, because any attempt to define the duty of care owed by a member of the clergy to a congregant or parishioner would result in excessive entanglement on the part of the court in matters of religion (*see Langford v Roman Catholic Diocese of Brooklyn*, 271 AD2d 494, 495; *Joshua S. v Casey*, 206 AD2d 839; *Schmidt v Bishop*, 779 F Supp 321, 327-328 [applying New York Law]).

We further conclude that the court properly dismissed the complaint against defendant T. insofar as it may be construed to allege a breach of fiduciary duty. At the outset, we note that the closest plaintiffs have come to alleging a breach of fiduciary duty is their allegation that, in carrying on a sexual affair with Wende C., defendant T. breached "the sacred trust between counselor and careseeker in the course of the ministerial relationship." That purported cause of action might aptly be labeled one for "clergy misconduct" or perhaps "abuse of pastoral position," inasmuch as pleading a breach of fiduciary duty is, in this context, merely "'an elliptical way of alleging clergy malpractice'" (*Franco v Church of Jesus Christ of Latter-Day Saints*, 21 P3d 198, 203 [Utah]; *see Dausch v Rykse*, 52 F3d 1425, 1429, 1438 [7th

Cir] [applying Illinois law]; *Schieffer v Catholic Archdiocese of Omaha*, 244 Neb 715, 720-721, 508 NW2d 907, 912; *Schmidt*, 779 F Supp at 326).

Even accepting plaintiffs' characterization, we nevertheless conclude that there is no meaningful analytical distinction between a cause of action for breach of fiduciary duty by a cleric and one for clergy malpractice. Therefore, for the same reasons that a cause of action for clergy malpractice is not cognizable, a cause of action for breach of fiduciary duty by a cleric may not be predicated on the allegations set forth in this case (*see Langford*, 271 AD2d at 495; *Schmidt*, 779 F Supp at 325-326). An inquiry into whether a cleric violated a fiduciary duty to a congregant would involve the court in the same excessive entanglement in religious affairs as an inquiry into whether the cleric violated a duty of due care owed to the congregant. In either case the court would be required to "'venture into forbidden ecclesiastical terrain" (*Langford*, 271 AD2d at 495; *see Schmidt*, 779 F Supp at 325-326). In terms of the examination necessitated into the moral precepts, theology, and rules of governance of a particular church and religion, we see no distinction between positing a clerical duty of due care (as under the law of negligence) and positing a clerical duty of due care, loyalty, fidelity, honesty and good faith (as under the law governing the conduct of fiduciaries). There is likewise no appreciable difference in the nature of the inquiries into whether a cleric might have been careless, and whether he might have been neither careful nor morally and ethically upright. In either instance, the court's task would be the impermissible one of determining whether the cleric "grossly abused his pastoral role" (*Schmidt*, 779 F Supp at 326) or otherwise breached his "duties as a member of the clergy offering religious counseling to the plaintiff" (*Langford*, 271 AD2d at 495). In either instance, the court would have to compare the cleric's behavior with what it should have been, vocationally and religiously speaking.

In our view, plaintiffs' unpleaded claim for breach of fiduciary duty cannot be resolved in accordance with neutral principles of law, i.e., without any judicial inquiry into religious precepts. In other words, the claim cannot be adjudicated without reference to the status, role, and expected behavior of defendant T. as a pastor, from which his status and all of his credentials as a counselor derive. In that regard, we note that defendant T. was not a therapeutic counselor with any state license or state-recognized credentials, but rather was merely a religious counselor. There is thus no basis for concluding that the pastoral counseling relationship and behavior in question may be regarded as essentially secular in nature. Indeed, according to the explicit allegations of the complaint, the matter of religion, and more particularly the "ministerial relationship," "is not 'merely incidental' to . . . plaintiff[s'] relationship with . . . defendant [T.], 'it is the foundation for it' " (*Amato v Greenquist*, 287 Ill App 3d 921, 932, 679 NE2d 446, 454; *see Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580, 603 NW2d 816, 823). Thus, if defendant T. is to be judicially stripped of his status as plaintiffs' pastor, then he cannot legally be regarded as a counselor either, because he has no secular standing or credentials as such (*see Langford v. Roman Catholic Diocese of Brooklyn*, 177 Misc 2d 897, 901-902, *affd* 271 AD2d 494). In that event, plaintiffs' claim against defendant T. would allege nothing more than the common-law causes of action for alienation of affections and criminal conversation, which are no longer recognized in New York as bases for the imposition of tort liability (*see* Civil Rights Law §§ 80-a, 84; *Langford*, 177 Misc 2d at 902 n 15). Indeed, the only circumstance that distinguishes the relationship between Wende C. and defendant T. from the ordinary adulterous relationship is the fact that defendant T. is a minister. Because a tort action based strictly upon adulterous conduct is prohibited by the Civil Rights Law, liability, if any, must arise from defendant T.'s status as a minister. However, to impose greater liability

on an adulterer who happens to be a minister than on any other adulterer would, in our view, violate constitutional principles.

We are thus unable in this context to discern any distinction between a claim for clergy malpractice and one for the breach by a cleric-counselor of his fiduciary duty to his congregants/counselees. In particular, we fail to see how it avoids concerns of "excessive entanglement" to posit that defendant T. was guilty of a breach of a "trust" or "confidence" as opposed to a duty of due care. "Trust" and "confidence" are, like "due care," merely shorthand for plaintiffs' legitimate legal expectations, and here all of plaintiffs' expectations stemmed from plaintiffs' status as congregants and defendant T.'s status and role as plaintiffs' pastor-counselor. Indeed, the only trust or confidence alleged here is that defendant T. would not abuse his clerical obligations to and pastoral authority over plaintiffs, which obligations and authority are derived completely from the tenets of the particular religion and church to which plaintiffs and defendant T. belonged. Contrary to the dissent's position, the religious entanglements are not avoided by analyzing the claim on the basis of the specific fiduciary relationship of trust allegedly existing between the cleric and his congregants in a particular counseling relationship, as opposed to a more generalized standard of care to be adhered to by all clergy in all of their dealings with their congregants. In either case, it could be only the status and role of defendant T. as a pastor-counselor that would render him a fiduciary answerable for the breach of plaintiffs' trust by engaging in an adulterous relationship with Wende C.

In view of the foregoing, we conclude that the court further properly granted the motion and cross motions of the remaining defendants for summary judgment dismissing the complaint against them. In the absence of any wrongful or actionable underlying conduct by defendant T., there can be

no imposition of vicarious liability against any alleged employer or principal of defendant T. pursuant to the doctrine of respondeat superior (*see Karaduman v Newsday, Inc.*, 51 NY2d 531, 545-546; *Nichols v Niagara Mohawk Power Corp.*, 37 AD2d 909, 910, *affd* 33 NY2d 670; *cf. Richardson v New York Univ.*, 202 AD2d 295, 297; *see generally Bing v Thunig*, 2 NY2d 656, 666-667). Further, even if there had been some actionable conduct on the part of defendant T., there can be no respondeat superior liability where, as here, the conduct was not committed within the scope or furtherance of the employment or agency (*see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251; *McKay v Healthcare Underwriters Mut. Ins. Co.*, 295 AD2d 686, 687, *lv denied* 99 NY2d 503; *Paul J.H. v Lum*, 291 AD2d 894, 895; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161, *cert denied* 522 US 967, *lv dismissed* 91 NY2d 848; *Joshua S.*, 206 AD2d 839; *Mary KK. v Jack LL.*, 203 AD2d 840, 841).

The court further properly dismissed the complaint against the remaining defendants insofar as it may be construed to allege negligent ordination of defendant T. The ordination of clergy is a "quintessentially religious" activity, and imposing liability for conferring that status would excessively entangle the court in religious affairs, in violation of the First Amendment (*see Kenneth R.*, 229 AD2d at 162-163). Moreover, in the absence of any actionable conduct by defendant T., plaintiffs may not recover from any of the remaining defendants for their alleged negligence in hiring, supervising, or retaining him (*see Primeau v Town of Amherst*, 303 AD2d 1035, 1036; *cf. Borden v Capital Dist. Transp. Auth.*, 307 AD2d 1059, 1061-1063; *Acevedo v Audubon Mgt.*, 280 AD2d 91, 97-98).

All concur except PIGOTT, JR., P.J., and SCUDDER, J., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. First, in our view, Supreme Court improperly granted summary

judgment to defendant Dr. G. Charles T. (defendant T.) on plaintiffs' sexual battery cause of action, and, specifically, with regard to those incidents of alleged touching that occurred during counseling between defendant T. and plaintiff Wende C. within one year of commencement of the action. Second, the court improperly granted summary judgment to defendant T. with regard to plaintiffs' breach of fiduciary duty cause of action. Third, the court improperly granted those parts of the motion of defendants Western New York Conference of the United Methodist Church (Conference) and David Lubba and the cross motion of defendant Bishop Hae-Jong Kim for summary judgment dismissing plaintiffs' claims of negligent supervision and retention against them.

It is beyond cavil that a court must not assess credibility on a motion for summary judgment (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631). "Summary judgment should not be granted 'if there is any doubt as to the existence of factual issues . . . or where the issue is arguable'" (*Gateway Dev. & Mfg. v Commercial Carriers*, 296 AD2d 821, 625).

Applying those well-established principles to this appeal, we turn first to plaintiffs' sexual battery cause of action and conclude that plaintiffs made a prima facie showing of entitlement to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 324). Plaintiffs submitted evidence in admissible form establishing that a counseling relationship did indeed exist between Wendy C. and defendant T. between November 2, 1999 and February 2000. Contrary to the conclusion of the majority, plaintiffs also submitted admissible evidence establishing that four instances of unwanted touching occurred within that time frame and, hence, within the applicable statute of limitations for sexual battery, to wit: defendant T. instructed Wendy C. to perform oral sex on him on November 2, 1999; engaged in sexual fondling and other sexual acts with her in her car after a counseling session on November 16, 1999; grabbed and kissed her on December 24,

1999; and touched her breasts and genitals after a January 21, 2000 counseling session. Furthermore, in her affidavit in support of the motion, Wendy C. averred that the incidents of unwanted sexual contact occurred at a time when she was unable to fully consent because of defendant T.'s control and influence over her as her counselor. In our view, far from "establishing as a matter of law that the romantic attachment was mutual," the evidence submitted by plaintiffs is sufficient to meet their burden of establishing their entitlement to judgment as a matter of law (*see id.*). We submit that both the majority and Supreme Court have made credibility determinations that are inappropriate at the prediscovery stage of this action (*see Ferrante*, 90 NY2d at 631).

Defendant T. did not oppose plaintiffs' motion against him. Rather, the court sua sponte granted summary judgment to him on the sexual battery cause of action. We submit that was error. While we do not dispute the court's power to review the record and grant summary judgment in the absence of a motion (*see* CPLR 3212 [b]), in our view, there is no evidence in the record rebutting plaintiffs' allegations that a counseling relationship existed. Defendant T.'s unsigned, unverified statement to a church committee in response to Wendy C.'s allegations, in which defendant T. alleges that he and Wendy C. were "not engaged in an active or particular counseling relationship at the time of our inappropriate involvement," is of no evidentiary value because it was not submitted in admissible form. Even if the statement had been verified, it would have merely given rise to competing versions of the same events, which precludes an award of summary judgment to defendant T. on the sexual battery cause of action.

We agree with the majority that there is no cognizable claim for clergy malpractice in this State. Such a claim would rest on the violation of a generalized professional standard (*see Schmidt v Bishop*, 779 F Supp 321, 327) and would

involve excessive entanglement on the part of the court in matters of religion (*see Langford v Roman Catholic Diocese of Brooklyn*, 271 AD2d 494, 495; *Joshua S. v Casey*, 206 AD2d 839). However, we further conclude that the court erred in dismissing the complaint against defendant T. insofar as it asserts a breach of fiduciary duty cause of action. In their complaint, plaintiffs allege that the sexual relationship between Wendy C. and defendant T. was a breach of "the sacred trust between counselor and careseeker." Moreover, such a cause of action was specifically asserted in plaintiffs' motions and cross motion with regard to both plaintiffs, countered by defendants and addressed by the court. We thus conclude that a cause of action based on breach of fiduciary duty is properly before this Court (*see* CPLR 3026; *City of Syracuse v R.A.C. Holding*, 258 AD2d 905).

We disagree with the majority's conclusion that "there is no meaningful analytical distinction between a claim of breach of' fiduciary duty by a cleric and one for clergy malpractice." In our view, there is a subtle and important difference between a clergy malpractice cause of action and one sounding in breach of fiduciary duty. A cause of action based upon breach of fiduciary duty rests not on the violation of a generalized professional standard, but on the abuse of a particularized relationship of trust (*see Mandelblatt v Devon Stores*, 132 AD2d 162, 168, quoting Restatement [Second] of Torts § 874, Comment *a* ["'A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'"]). As an oft-cited recitation of the definition of a fiduciary relation states:

> "Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been

> reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another" (*Penato v George*, 52 AD2d 939, 942, *appeal dismissed* 42 NY2d 908; *see WIT Holding Corp. v Klein*, 282 AD2d 527, 529).

"The term [fiduciary relationship] is a very broad one. It is said that the relation exists, and that relief is granted *in all cases* in which influence has been acquired and abused, in which confidence has been reposed and betrayed. *The origin of the confidence and the source of the influence are immaterial*" (*Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 172 [Hancock, Jr., J., dissenting] [citations omitted, emphasis in original omitted and emphasis added]).

"While the 'exact limits' of what constitutes a fiduciary relationship are 'impossible of statement,' a fiduciary relationship may be found in any case 'in which influence has been acquired and abused, in which confidence has been reposed and betrayed'" (*United Feature Syndicate v Miller Features Syndicate*, 216 F Supp 2d 198, 218, quoting *Penato*, 52 AD2d at 942; *see Rose v Simms*, 1995 WL 764226, *9 1995 US Dist. LEXIS 17686, *27 [SD NY, Dec. 27, 1995]). Thus, while the existence of a clergy malpractice claim would depend on defining and evaluating a cleric's religious duty, a claim for breach of fiduciary duty depends only upon an evaluation of whether a relationship of trust and confidence exists and whether that trust and confidence have been abused.

Further, we disagree with the majority's emphasis on defendant T.'s lack of official counseling credentials as evidencing the absence of a fiduciary duty. The existence of a fiduciary duty — or defendant T.'s status as a "secular" counselor — does not, in our view, depend on such official credentials (*see*

Perato, 52 AD2d at 942). That is especially true in light of the record evidence that defendant T. touted his experience as a counselor using "secular" counseling tools and techniques.

The majority fears "excessive entanglement" in religion and uses that fear as a basis to deny recognition of such a breach of fiduciary duty claim in New York State. In this vein, the majority asserts that a "court's task would be the impermissible one of determining whether the 'defendant grossly abused his pastoral role'" (citations omitted). In our view, the majority's "all or nothing" approach — a cleric is at all times, and for all purposes, acting on behalf of his or her religion, and therefore there can be no inquiry into his or her actions without "entangling" oneself in religion — is unwarranted. We submit that the majority's analysis destroys the "neutral principles" doctrine adopted by the Court of Appeals to resolve disputes involving religious organizations (*see First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am.*, 62 NY2d 110, 116, *cert denied* 469 US 1037; *Avitzur v Avitzur*, 58 NY2d 108, 114, *cert denied* 464 US 817 ["a State may adopt any approach to resolving religious disputes which does not entail consideration of doctrinal matters . . . us(ing) the 'neutral principles of law' approach," quoting *Jones v Wolf*, 443 US 595, 602]; *see also Park Slope Jewish Ctr. v Congregation B'nai Jacob*, 90 NY2d 517, 521 ["we (have) adopted and applied the 'neutral principles of law' analysis as a matter of State law"]). Other courts of this State also have applied the neutral principles doctrine (*see Sieger v Union of Orthodox Rabbis of U.S. & Canada*, 1 AD3d 180; *Sam v Church of St. Mark*, 293 AD2d 663, 664; *Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville*, 250 AD2d 282).

In our view, the majority's approach to this case renders the "neutral principles" doctrine meaningless. The majority's holding forbids all inquiry into matters of fiduciary duty by

virtue of the fact that defendant T. is a pastor and impermissibly insulates clerics from all liability in a counseling context. Indeed, the majority's holding could be misconstrued to encourage secular counselors to posture their counseling in terms of spiritual guidance. As the aforementioned case law makes clear, courts have the power to resolve disputes involving religious persons and organizations to the extent that they can do so without examining religious doctrine or dogma (*see Matter of New York State Empl. Relations Bd. v Christ the King Regional High School*, 90 NY2d 244, 250 [" '"the line of separation (between church and state), far from being a 'wall,' is a blurred, indistinct, and variable barrier depending upon all the circumstances of a particular relationship" ' "]). As the Second Department has properly noted:

> "[W]hile the First Amendment to the United States Constitution prohibits regulation of religious beliefs, conduct by a religious entity 'remains subject to regulation for the protection of society' . . . The First Amendment does not grant religious organizations absolute immunity from tort liability . . . Therefore, religious entities must be held accountable for their actions, 'even if that conduct is carried out as part of the church's religious practices' " (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 165 (internal citations omitted], *cert denied* 522 US 967, *lv dismissed* 91 NY2d 848).

Contrary to the majority's fear of "ventur[ing] into forbidden ecclesiastical terrain" (internal quotation marks omitted), we submit that our proposed inquiry does not entail excessive probing into church doctrine in this case. First, the record establishes that defendant T. and the defendant ecclesiastical entities have admitted that defendant T. engaged in an inappropriate relationship with Wendy C. in the eyes of the church and its doctrine, and that the behavior of defendant T. was outside the scope of his employment. In our view, those

admissions obviate the need for any inquiry into defendants' religious tenets (*see New York State School Bds. Assn. v Sobol*, 79 NY2d 333, 342-343, *cert denied* 506 US 909 [rejecting as "entirely speculative" an "excessive entanglement" assertion where "any religious input is not likely to rise to anything approaching the required 'excessive' entanglement level"]). More obvious, however, is the fact that probing the circumstances of this case does not require an examination of the religious beliefs held by plaintiffs or defendants. Instead, the only inquiry required would be whether Wendy C. or her husband, plaintiff David C., placed a level of trust in defendant T. with regard to their marriage and their separate counseling relationships with him, and whether defendant T. abused that trust. In light of defendant T.'s admissions of impropriety concerning Wendy C., as well as evidence in the record that defendant T. had used secular counseling techniques with both Wendy C. and David C., any inquiry would clearly not delve into religious doctrine. In sum, there is no venture into ecclesiastical terrain here, and therefore no excessive entanglement.

Thus, we submit that issues of fact exist that preclude summary judgment on plaintiffs' breach of fiduciary duty cause of action, specifically with respect to whether (1) Wendy C. placed trust and confidence in defendant T. to counsel her to wellness and to avoid any sexual contact, especially in light of her explicitly stated desire to end the counseling relationship because of the possibility of romantic/sexual involvement; (2) David C. placed trust and confidence in defendant T. to help his marriage and avoid further harm to his marriage; and (3) defendant T. undertook the trust and confidence reposed in him by both Wendy C. and David C. and then abused that trust and confidence. In our view, such an inquiry entails nothing more nor less than an examination of the reposed and allegedly abused trust and avoids an inquiry into religious doctrine.

Finally, we would deny those parts of the motion of Conference and Lubba and the cross motion of Hae-Jong Kim for summary judgment dismissing plaintiffs' claims of negligent supervision and retention against them. In our view, plaintiffs met their burden in opposition by tendering sufficient evidence to raise issues of fact warranting a trial regarding those remaining defendants' notice or knowledge of defendant T.'s tendencies to sexually abuse congregants and/or the actual conduct at issue here. However, we conclude that the court properly granted the cross motion of defendant Hosanna Junction United Methodist church (Hosanna Junction) for summary judgment dismissing the complaint against it. Hosanna Junction met its initial burden of establishing its entitlement to judgment as a matter of law, and plaintiffs failed to raise a material issue of fact sufficient to warrant a trial on the issue whether Hosanna Junction could be held liable for the hiring, firing or supervision of defendant T.

We therefore would modify the order by vacating the award of summary judgment to defendant T. in part, reinstating plaintiffs' sexual battery and breach of fiduciary duty causes of action against him, and denying the motion of Conference and Lubba and the cross motion of Hae-Jong Kim in part, reinstating plaintiffs' claims of negligent supervision and retention against them.

Entered: April 30, 2004

JoAnn M. Wahl
Clerk of the Court

Appendix C

Opinion of the State of New York Court of Appeals, Dated and Filed February 22, 2005

State of New York
Court of Appeals

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4 No. 2
Wende C. and David C. (Anonymous),

Appellants,

v.

United Methodist Church, New York West Area,

Defendant,

Western New York Conference of United Methodist Church, et al.,

Respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Christina A. Agola, for appellants.
James C. Gocker, for respondent Kim.
Jonathan B. Fellows, for respondents Yonkers Medical Services, P.C., et al.

CIPARICK, J.:

Plaintiffs Wende C. and David C. were parishioners at Hosanna Junction United Methodist Church. During the period between January 1999 and April 2000, they sought individual counseling services from the church pastor Dr. G. Charles T. (Pastor T.). In the course of engaging in apparently intermittent ministerial counseling, Wende C. and the pastor developed a sexual relationship that lasted several months. On November 2, 2000, after David discovered the affair, plaintiffs commenced this action against defendants Pastor T.,

the Hosanna Junction United Methodist Church and various other ecclesiastical entities and officials for sexual battery, intentional infliction of emotional distress, clergy malpractice and negligent retention and supervision.

Supreme Court denied plaintiffs' motions and cross-motion for summary judgment, granted summary judgment sua sponte to the pastor, and granted the motion and cross-motions of the remaining defendants for summary judgment, dismissing the complaint in its entirety. Plaintiffs appealed, and a divided Appellate Division affirmed. As relevant here, the majority held that the claims of battery — arising from incidents of touching that occurred more than a year prior to commencement of this action — were time-barred (*see* CPLR 215 [3]). As to the remaining encounters between Wende C. and Pastor T., the majority concluded that the record established as a matter of law that their "romantic attachment was mutual and the[ir] sexual contact [was] consensual . . ." (6 AD3d 1047, 1049 [2004]).

The majority next addressed plaintiffs' argument that, in carrying on a sexual relationship with Wende C., the pastor breached his fiduciary duty.[1] While noting that plaintiffs failed to plead this cause of action, the majority concluded "that there is no meaningful analytical distinction between a cause of action for breach of fiduciary duty by a cleric and one for clergy malpractice" (*id.* at 1050). Finally, the majority dismissed the negligent supervision and retention claims on the ground that no vicarious liability existed in the absence of any wrongful or actionable conduct by Pastor T.

Two Justices dissented in part, voting to reinstate the sexual battery and breach of fiduciary duty causes of action against Pastor T. and the claims of negligent supervision and

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[1] It should be noted that Pastor T. had no license for professional counseling that might give rise to a complaint under the Education Law.

retention against defendants Western New York Conference of the United Methodist Church, District Superintendent David Lubba and Resident Bishop Hae-Jong Kim. Plaintiffs appeal as of right based on the two-Justice dissent, and we now affirm.

It is well settled that Supreme Court may grant a party summary judgment absent a cross-motion for such relief where judgment is required as a matter of law (*see* CPLR 3212 [b]). A valid claim for battery exists where a person intentionally touches another without that person's consent (*see* PJI 2d 3:3 [2005]; *see also* Restatement [Second] of Torts § 18, Comment c, Illustration 1). Here, there is no dispute that Pastor T. intended the subject physical contact with Wende C. The parties only contest whether his actions were based on a lack of consent.[2]

On the record before us, we conclude that as a matter of law the sexual relationship between the parties was indeed consensual. There exist no questions of fact "as to what occurred and when" (dissenting opn at 2). Indeed, Wende C. admitted that, on February 25, 1999, she initiated discussions with Pastor T. concerning her attraction to him. While she informed him that she preferred to terminate the ministerial counseling at that time, the record includes a sample of subsequent e-mails exchanged between the two expressing a shared affection and professing a growing love for one another. To be sure, after the affair was discovered, Wende C. took the initiative of forwarding these same e-mails to members of the congregation with the stated intention of demonstrating that the subject relationship was "very mutual." Referring to the electronic correspondence as setting forth

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[2] Our discussion here is limited to plaintiffs' allegations of unwanted touching that occurred after November 2, 1999. Any battery cause of action arising from contact between the parties before that date is barred by the applicable one-year statute of limitations (*see* CPLR 215 [3]).

"a clearer, more accurate and truthful picture" of the affair, she stated in the accompanying letter: "[Pastor T.] was *just* as responsible as I was in regards to how [the relationship] began and the course it followed" (emphasis in original).

No record evidence exists that either Wende C.'s physical or emotional condition or prescribed medication impaired her ability to engage in a romantic relationship with Pastor T. or to consent to his physical contact. As there is no proof that Wende C. suffered from infancy, mental impairment or physical helplessness so as to render her consent impossible, Pastor T. was properly granted summary judgment sua sponte on the battery claim.

Moving next to plaintiffs' contentions that Pastor T. breached his fiduciary duties to them, we note that these causes of action were not specifically pleaded. The complaint does not contain any allegation that Pastor T. breached his fiduciary duty to David C. during the period that David received counseling services from the pastor. The language in the complaint most resembling a fiduciary cause of action is found in a paragraph that refers only to Wende C. The paragraph alleges that Pastor T. exploited Wende "in the guise of providing pastoral counselling . . . and in breach of the sacred trust between counsellor and careseeker in the course of the ministerial relationship." The complaint continues to state that the sexual battery alleged therein occurred while Pastor T. "was acting within the authority granted to him by the defendant Church . . . under the guise of his role as pastor in the ministerial relationship between himself and . . . a congregant, and [in] his position as a responsible member of the clergy."

While the complaint's brief reference to a "sacred trust" may arguably be couched as alluding to a fiduciary duty, the surrounding language and the allegations that follow sound in clergy malpractice, which would improperly require courts

to examine ecclesiastical doctrine in an effort to determine the standard of due care owed to parishioners undergoing ministerial counseling (*see First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am.*, 62 NY2d 110, 116 [1984] [providing that "civil courts are forbidden from interfering in or determining religious disputes"]; *see also Md. v Va. Eldership Churches of God v Church of God at Sharpsburg, Inc.*, 396 US 367, 369 [1970] [Brennan, J. concurring]). Given that no fiduciary cause of action is properly before us, we leave open for another day the question whether such a claim may arise between a cleric and a parishioner under very different circumstances, not present here. Plaintiffs' remaining contentions are without merit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Appendix C

Wende C. v United Methodist Church, New York West Area, et al

No. 2

SMITH, J. (dissenting in part):

The two-Justice dissent in the Appellate Division concluded that summary judgment should not be granted because of contested allegations of sexual battery alleged to have occurred within one year of the action which was filed in November 2000 and because of the defendant pastor's breach of a fiduciary relationship. Based upon the dissent at the Appellate Division, I dissent here. I write only to emphasize several points.

Defendant Pastor T. did not oppose the plaintiffs' motion for summary judgment against him. Rather, plaintiffs moved for summary judgment and the defendants, other than Pastor T., cross-moved for summary judgment. The motion court denied the plaintiffs' motion and granted the defendants' motion. It further searched the record and, on its own motion, granted summary judgment in favor of Pastor T. against the plaintiffs.

It is undisputed that the plaintiffs received marital counseling from Pastor T. The plaintiffs contend that while they were undergoing counseling, said defendant committed battery by forcing himself sexually upon Wende C. Plaintiffs contend further that Pastor T. breached his fiduciary duty by engaging in an inappropriate sexual relationship during the time that he was counseling the marital couple.

Insofar as sexual battery is concerned, there is a question of fact as to what occurred, when it occurred and whether there was consent. As for the allegation of a breach of a fiduciary relationship, I cannot agree with the majority at the Appellate Division that there is no difference between an allegation of clergy malpractice, which would improperly

involve the courts in ecclesiastical matters, and breach of a fiduciary relationship.[3] What plaintiffs are alleging is that Pastor T. held himself out as a person qualified to give marital counseling, that they went to him seeking counseling for marital problems and that he breached a duty owed to them. Thus, plaintiffs are making allegations similar to those made against a psychiatrist who holds himself out as a person able to assist with problems of a psychological nature and then abuses the trust. In discussing its disagreement with the majority, the dissenters at the Appellate Division stated:

> We disagree with the majority's conclusion that 'there is no meaningful analytical distinction between a claim of breach of fiduciary duty by a cleric and one for clergy malpractice.' In our view, there is a subtle and important difference between a clergy malpractice cause of action and one sounding in breach of fiduciary duty. A cause of action based upon breach of fiduciary duty rests not on the violation of a generalized professional standard, but on the abuse of a particularized relationship of trust (*see Mandelbart v Devon Stores*, 132 AD2d 162, 168, quoting Restatement [Second] of Torts § 874, Comment a ["'A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'"]).

Plaintiff Wende C. alleges that between November 2, 1999, and February 2002, while the pastor was giving marriage counseling to the plaintiffs, he engaged in instances of unwanted sexual contact against Wende C. These included an instruction to perform oral sex on him on November 2, 1999, sexual fondling and other sexual acts in a car on November 16, 1999, kissing on December 24, 1999, and fondling on

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[3] The majority opinion here does not discuss the issue of the difference between clergy malpractice and breach of a fiduciary duty.

January 21, 2000. All of these instances allegedly occurred after counseling sessions. Moreover, the statute of limitations had not run on these incidents prior to the filing of the lawsuit.

In addition, plaintiffs' allegation is that while Pastor T. was engaging in marital counseling, he breached a duty of trust by engaging in sexual encounters. In the words of the dissenters at the Appellate Division, "while the existence of a clergy malpractice claim would depend on defining and evaluating a cleric's religious duty, a claim for breach of fiduciary duty depends only upon an evaluation of whether a relationship of trust and confidence exists and whether that trust and confidence have been abused."

Other states have concluded that an action for breach of a fiduciary duty can be maintained where a pastor engages in an inappropriate sexual relationship when pastoral counseling is sought (*see*, for example, *F.G. v MacDonell*, 150 NJ 550, 696 A2d 697 [1997]); *Sanders v Casa View Baptist Church*, 134 F3d 331 [1998, Texas]; *Destefano v Grabrian*, 763 P.2d 275 [1988, Colorado]).

For these reasons I would permit plaintiffs to prove their allegations against all of the defendants.

* * * * * * * * * * * * * * * * * *

Order affirmed, with costs. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Rosenblatt, Graffeo, Read and R.S. Smith concur. Judge G.B. Smith dissents in part in an opinion.

Decided February 22, 2005

Appendix D

Summons with Complaint, Dated October 18, 2000 and Filed November 2, 2000

SUPREME COURT OF THE STATE OF NEW YORK
MONROE COUNTY

SUMMONS
WITH COMPLAINT

Index No. 12263/2000

RECEIVED
2000 NOV -2 P 12:26
MONROE COUNTY CLERK

WENDE CLEARY, and her spouse, DAVID CLEARY,

Plaintiffs,

-against-

THE UNITED METHODIST CHURCH, NEW YORK WEST AREA, 1010 East Avenue, Rochester, New York, 14607; THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH, 8499 Main Street, Buffalo, New York 14221, DR. G. CHARLES TEN EYCK, Individually and in his capacity as Pastor of the HOSANNA JUNCTION UNITED METHODIST CHURCH, 357 Fairport Road, Rt. 31F, East Rochester, New York 14445; HAE-JONG KIM, Resident Bishop, THE UNITED METHODIST CHURCH, NEW YORK WEST AREA, 1010 East Avenue, Rochester, New York 14607; DAVID LUBBA, District Superintendent, Rochester District, The United Methodist Church, 1050-A, East Avenue, Rochester, New York 14607

Defendants.

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED AND REQUIRED TO RESPOND to the claim for relief sought by the Plaintiff by serving written Notice of Appearance on the Defendant, at the address stated below.

Appendix D

If this Summons is served upon you in the State of New York by personal service, you must respond within **twenty (20) days** after service, not counting the day of service. If this Summons with Notice is not personally delivered to you within the State of New York, you must respond within **thirty (30) days** after service is completed as provided by law.

This action is commenced in the County of Monroe because the Plaintiff has been a resident of Monroe County for one or more years and that the cause of action occurred in the State of New York, County of Monroe.

DATED: October 20, 2000
Buffalo, New York

/s/

CHRISTINA A. AGOLA, ESQ.
30 Stablegate Estates
Webster, New York 14580
(716) 872-6347

Appendix D

SUPREME COURT OF THE STATE OF NEW YORK
MONROE COUNTY

COMPLAINT
INDEX NO.:

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WENDE CLEARY, and her spouse, DAVID CLEARY,

Plaintiffs,

-against-

THE UNITED METHODIST CHURCH, NEW YORK WEST AREA, 1010 East Avenue, Rochester, New York, 14607; THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH, 8499 Main Street, Buffalo, New York 14221, DR. G. CHARLES TEN EYCK, Individually and in his capacity as Pastor of the HOSANNA JUNCTION UNITED METHODIST CHURCH, 357 Fairport Road, Rt. 31F, East Rochester, New York 14445; HAE-JONG KIM, Resident Bishop, THE UNITED METHODIST CHURCH, NEW YORK WEST AREA, 1010 East Avenue, Rochester, New York 14607;

Defendants.

Plaintiffs, **WENDE CLEARY** and her spouse, **DAVID CLEARY**, by their attorney, **CHRISTINA A. AGOLA, ESQ.**, herein allege as follows:

1. Plaintiff **WENDE CLEARY** is a female over the age of eighteen (18) and for all relevant times mentioned herein, a congregant of the defendant **HOSANNA JUNCTION UNITED METHODIST CHURCH**, a church within the defendant **THE UNITED METHODIST CHURCH, NEW YORK WEST AREA**, which is within the district

of the defendant **THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH**.

2. Plaintiff **DAVID CLEARY** is the spouse of Plaintiff **WENDE CLEARY** and is also over the age of eighteen (18). For all relevant times mentioned herein, a congregant of the defendant, **HOSANNA JUNCTION UNITED METHODIST CHURCH**, a church within the defendant **THE UNITED METHODIST CHURCH, NEW YORK WEST AREA** which is within the district of the defendant **THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH**.

3. Defendant **DR. G. CHARLES TEN EYCK** (hereinafter referred to as "Pastor Ten Eyck") is a United Methodist Church Pastor of the defendant **HOSANNA JUNCTION UNITED METHODIST CHURCH**, a church within the defendant **THE UNITED METHODIST CHURCH, NEW YORK WEST AREA**, which is within the district of the defendant **THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH**, and, upon information and belief, a licensed psychologist.

4. The Defendant **HOSANNA JUNCTION UNITED METHODIST CHURCH**, (hereinafter the "Church") is a church within the defendant **THE UNITED METHODIST CHURCH, NEW YORK WEST AREA**, which is within the district of the defendant, **THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH**.

5. The defendants, **THE UNITED METHODIST CHURCH, NEW YORK WEST AREA**, is a corporation duly licensed to do business in the State of New York; **THE WESTERN NEW YORK CONFERENCE OF**

Appendix D

THE UNITED METHODIST CHURCH, (hereinafter the "Conference") is a corporation duly licensed to do business in the State of New York.

6. That at various times between January 1999 and September 2000, defendant Pastor Ten Eyck was employed by the defendant Church as a Pastor, and defendant Hae-Jong Kim was employed as a Resident Bishop.

7. That at various times mentioned herein, the defendant Pastor Ten Eyck operated under the direct control and supervision of the defendant Church and the defendant Conference.

8. That on or about and between January 1999 and April 2000, the Plaintiff **WENDE CLEARY** was approached by the defendant Pastor Ten Eyck under the guise of encouraging the Plaintiff **WENDE CLEARY**, to engage in pastoral counselling.

9. Aware that the Plaintiff **WENDE CLEARY** was vulnerable, the Pastor Ten Eyck, in the course of the ministerial relationship and under the guise of pastoral counselling, nonetheless sexually abused and/or molested on numerous occasions the Plaintiff **WENDE CLEARY**, a congregant of the defendant Church, by inducing and/or subjecting Plaintiff **WENDE CLEARY** to engage in a sexual relationship with him, while contemporaneously counselling Plaintiff **DAVID CLEARY** with regard to his marriage to the Plaintiff **WENDE CLEARY**.

10. That during the period of January 1999 through April 2000, the defendant Pastor Ten Eyck further subjected the Plaintiff **WENDE CLEARY** to tales of his sexual exploits, the status of his failing marriage, in particular, looking for sympathy about his partner's sexual inadequacies, exposing the Plaintiff **WENDE CLEARY** to constant innuendo or sexual talk, suggestive comments, questions about the

intimate details of her relationship with her husband and other suggestive comments, all in the guise of providing pastoral counselling to the Plaintiff, **WENDE CLEARY**, and in breach of the sacred trust between counsellor and careseeker in the course of the ministerial relationship.

FIRST CAUSE OF ACTION

11. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 10 as if fully set forth herein.

12. The acts alleged herein occurred during the course and within the scope of employment of the defendants, and each of them.

13. The acts alleged herein occurred while the defendant Pastor Ten Eyck was acting within the authority granted to him by the defendant Church and defendant Conference and under the guise of his role as pastor in the ministerial relationship between himself and the Plaintiff **WENDE CLEARY**, a congregant, and his position as a responsible member of the clergy, and while acting as a representative of the defendant Church and defendant Conference.

14. The defendant Pastor Ten Eyck assaulted and sexually abused the Plaintiff, **WENDE CLEARY**.

15. As a direct and proximate result of the defendants' actions, the Plaintiff **WENDE CLEARY** has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress, and is thereby entitled to general and compensatory damages in amounts to be proven at trial. Furthermore, the defendants and each of them authorized, condoned and ratified the unlawful conduct of the defendants in this action. Consequently, the Plaintiff is also entitled to punitive damages from all defendants.

Appendix D

SECOND CAUSE OF ACTION

16. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 15 as if fully set forth herein.

17. Plaintiff **DAVID CLEARY** is the long term spouse of Plaintiff **WENDE CLEARY**.

18. In failing to protect the Plaintiff from the continuing sexual abuse and molestation and other offensive conduct of the defendant Pastor Ten Eyck, and further, in failing to take adequate remedial measures to prohibit Pastor Ten Eyck from continuing in this course of conduct, the defendants, and each of them, intentionally inflicted emotional distress on Plaintiffs **WENDE CLEARY** and **DAVID CLEARY**.

19. As a direct and proximate result of the defendants' actions, the Plaintiffs **WENDE CLEARY** and **DAVID CLEARY** have suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress, and are thereby entitled to general and compensatory damages in amounts to be proven at trial. Furthermore, the defendants and each of them authorized, condoned and ratified the unlawful conduct of the defendants in this action. Consequently, the Plaintiffs are also entitled to punitive damages from all defendants.

THIRD CAUSE OF ACTION

20. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 19 as if fully set forth herein.

21. The defendants and each of them had a duty to provide professional and responsible religious services and ministry to the Plaintiffs.

22. The defendants and each of them failed to properly fulfill their duty and responsibility to plaintiffs and instead,

provided services that were below the standards required by their profession, thus committing clergy malpractice.

23. The Plaintiffs were damaged.

FOURTH CAUSE OF ACTION

24. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 23 as if fully set forth herein.

25. Upon information and belief the defendant Church had prior knowledge or should have known that defendant Ten Eyck was a sexual deviant who deemed it appropriate to seduce and engage in sexual acts with otherwise vulnerable members of the congregation or careseekers in the ordinary course of the ministerial relationship.

26. Upon information and belief the defendant Church failed to take any action to protect the Plaintiffs from the actions of defendant Ten Eyck.

27. As a direct and proximate result of the defendants' actions, the Plaintiff **WENDE CLEARY** has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress, and is thereby entitled to general and compensatory damages in amounts to be proven at trial. Furthermore, the defendants and each of them authorized, condoned and ratified the unlawful conduct of the defendants in this action. Consequently, the plaintiffs are also entitled to punitive damages from all defendants.

FIFTH CAUSE OF ACTION

28. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 27 as if fully set forth herein.

29. Upon information and belief, the defendant Church is amply aware or should have known that there have been past problems with pastors, and in particular defendant Pastor Ten Eyck, engaging in sexual acts with members of the

congregation in the course of ministerial relations. In spite of this knowledge, the defendants and each of them, failed to properly screen and hire pastoral applicants, including the defendant Ten Eyck.

30. Upon information and belief, as a result of the defendant Church's negligence in screening and hiring pastors, including defendant Pastor Ten Eyck the Plaintiffs were damaged.

SIXTH CAUSE OF ACTION

31. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 30 as if fully set forth herein.

32. The defendants and each of them failed to establish proper guidelines, policies and/or procedures for responding to sexual abuse or other violations of professional ethics within the ministerial relationship, nor has the defendants and each of them provided any training regarding sexual abuse to the members of the congregation and clergy in order to prevent or thwart the injuries which occurred herein as alleged.

33. As a direct and proximate result of the defendants' actions, the Plaintiff **WENDE CLEARY** has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress, and is thereby entitled to general and compensatory damages in amounts to be proven at trial. Furthermore, the defendants and each of them authorized, condoned and ratified the unlawful conduct of the defendants in this action. Consequently, the Plaintiffs are also entitled to punitive damages from all defendants.

Appendix D

SEVENTH CAUSE OF ACTION

34. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 33 as if fully set forth herein.

35. Upon information and belief, the Pastor Ten Eyck has engaged in a similar pattern of behavior towards members of his congregation. The defendants and each of them were negligent in hiring defendant Pastor Ten Eyck.

36. As a direct and proximate result of the defendants' actions, the Plaintiff **WENDE CLEARY** has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress, and is thereby entitled to general and compensatory damages in amounts to be proven at trial. Furthermore, the defendants and each of them authorized, condoned and ratified the unlawful conduct of the defendants in this action. Consequently, the Plaintiffs are also entitled to punitive damages from all defendants.

EIGHTH CAUSE OF ACTION

37. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 36 as if fully set forth herein.

38. The defendants and each of them failed to have defendant Pastor Ten Eyck examined psychiatrically and/or psychologically to determine his fitness for serving in the capacity as a United Methodist Pastor.

39. As a direct and proximate result of the defendants' actions, the Plaintiff **WENDE CLEARY** has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress, and is thereby entitled to general and compensatory damages in amounts to be proven at trial. Furthermore, the defendants and each of them authorized, condoned and ratified the unlawful conduct of the defendants in this action. Consequently, the Plaintiffs are also entitled to punitive damages from all defendants.

Appendix D

NINTH CAUSE OF ACTION

40. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 39 as if fully set forth herein.

41. The defendants and each of them negligently retained and failed to properly supervise and monitor the activities of the defendant Pastor Ten Eyck.

42. As a direct and proximate result of the defendants' actions, the Plaintiff **WENDE CLEARY** has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress, and is thereby entitled to general and compensatory damages in amounts to be proven at trial. Furthermore, the defendants and each of them authorized, condoned and ratified the unlawful conduct of the defendants in this action. Consequently, the plaintiffs are also entitled to punitive damages from all defendants.

TENTH CAUSE OF ACTION

43. The Plaintiffs repeat and reallege each and every allegation in paragraphs 1 through 42 as if fully set forth herein.

44. Upon information and belief, the defendant Church and its superiors within the defendant Conference of the United Methodist Church, have by their practice, shown that it was indifferent to a known pattern of sexual misconduct by certain pastors under its control and who act under its authority and have failed to receive, investigate and act upon complaints of physical and sexual misconduct by certain of its pastors, and have further failed to discipline these certain pastors thus creating a climate and custom which proximately caused the assault, molestation and sexual abuse of **WENDE CLEARY**.

45. As a direct and proximate result of the defendants' actions, the Plaintiff **WENDE CLEARY** has suffered and will continue to suffer pain and suffering, and extreme and

severe mental anguish and emotional distress, and is thereby entitled to general and compensatory damages in amounts to be proven at trial. Furthermore, the defendants and each of them authorized, condoned and ratified the unlawful conduct of the defendants in this action. Consequently, the Plaintiffs are also entitled to punitive damages from all defendants.

WHEREFORE, PLAINTIFFS DEMAND THE FOLLOWING RELIEF:

1. On the first cause of action, compensatory and punitive damages against the defendants and each of them for Plaintiff **WENDE CLEARY** in an amount to be determined at trial.

2. On the second cause of action, compensatory and punitive damages against the defendants and each of them for Plaintiffs **WENDE CLEARY** and **DAVID CLEARY**.

3. On the third cause of action, compensatory and punitive damages against the defendants and each of them for Plaintiff **WENDE CLEARY**, and compensatory and punitive damages for Plaintiff **DAVID CLEARY** in an amount to be determined at trial.

4. On the fourth cause of action, compensatory and punitive damages against the defendants and each of them for Plaintiff **WENDE CLEARY**, and compensatory and punitive damages for Plaintiff **DAVID CLEARY** in an amount to be determined at trial.

5. On the fifth cause of action, in compensatory and punitive damages against the defendants and each of them for Plaintiff **WENDE CLEARY**, and compensatory and punitive damages for Plaintiff **DAVID CLEARY** in an amount to be determined at trial.

6. On the sixth cause of action, compensatory and punitive damages against the defendants and each of them for Plaintiff **WENDE CLEARY**, and compensatory and

punitive damages for Plaintiff **DAVID CLEARY** in an amount to be determined at trial.

7. On the seventh cause of action, compensatory damages and punitive damages against the defendants and each of them for Plaintiff **WENDE CLEARY** in an amount to be determined at trial.

8. On the eighth cause of action, compensatory and punitive damages against the defendants and each of them for Plaintiff **WENDE CLEARY** in an amount to be determined at trial.

9. On the ninth cause of action, compensatory and punitive damages against the defendants and each of them for Plaintiff **WENDE CLEARY** in an amount to be determination at trial.

10. On the tenth cause of action, compensatory and punitive damages against the defendants and each of them for Plaintiff **WENDE CLEARY** in an amount to be determined at trial.

DATED: ROCHESTER, NEW YORK
OCTOBER 18, 2000

YOURS, ET CETERA

/s/

CHRISTINA A. AGOLA, ESQ.
30 STABLEGATE ESTATES
NEW YORK, NEW YORK 14580
(716) 872-6347

(3)

No. 04-1574

Supreme Court, U.S.
FILED
JUL 21 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WENDE C. and DAVID C. (ANONYMOUS),

Petitioners,

v.

THE UNITED METHODIST CHURCH, NEW YORK WEST AREA; THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH; DR. G. CHARLES TEN EYCK, Individually and in his capacity as Pastor of the HOSANNA JUNCTION UNITED METHODIST CHURCH; HAE-JONG KIM, Resident Bishop, THE UNITED METHODIST CHURCH, NEW YORK WEST AREA; DAVID LUBBA, District Superintendent, Rochester District, The United Methodist Church,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENTS WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH AND REVEREND DAVID LUBBA

H. J. HUBERT, ESQ.
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Attorney for Respondents Western New York Conference of The United Methodist Church and Reverend David Lubba

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Is the Decision of the New York State Court of Appeals reviewable by this Court when the New York State Court of Appeals relied on New York procedural rules and independent state grounds in affirming the dismissal of Petitioners' claims.

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of Jurisdiction	1
Counter-Statement of the Case	1
Reasons for Denying the Petition	6
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Coleman v. Thompson,
501 U.S. 722 (1991) 6, 7

Herb v. Pitcairn,
324 U.S. 117 (1945) 6

Kunkle v. Texas,
125 S. Ct. 818 (2004) 7

Lambrix v. Singletary,
520 U.S. 518 (1997) 6

Michigan v. Long,
463 U.S. 1032 (1983) 6, 7

Sochor v. Florida,
504 U.S. 527 (1992) 6

Wende C. and David C. v. United Methodist Church, New York West Area, et al.,
6 A.D.3d 1047 (4th Dept. 2004) 4, 5

Wende C. and David C. v. United Methodist Church, New York West Area, et al.,
4 N.Y.3d 293 (2005) 5, 7

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1, 6

28 U.S.C. § 1257(a) 1, 6

STATEMENT OF JURISDICTION

Petitioners erroneously assert that this Court has jurisdiction based upon 28 U.S.C. § 1254(1) which provides for jurisdiction for appeals from the United States Courts of Appeals, not the New York State Court of Appeals. This Court is jurisdictionally empowered under limited circumstances to review a final judgment rendered by a state's highest court under 28 U.S.C. § 1257(a). However, as set forth in this brief, this Court does not have jurisdiction to review the decision of the New York State Court of Appeals under 28 U.S.C. § 1257(a).

COUNTER-STATEMENT OF THE CASE

Wende C. and David C. allege that they became members of the Hosanna Junction United Methodist Church in May 1998.

The crux of petitioners' Complaint is as follows:

1. On or about and between January 1999 and April 2000, petitioner Wende C. was approached by respondent Pastor T. under the guise of encouraging Wende C. to engage in pastoral counseling.

2. Aware that Wende C. was vulnerable, Pastor T., in the course of the ministerial relationship and under the guise of pastoral counseling, nonetheless sexually abused and/or molested Wende C., a congregant of the defendant Church, by inducing and/or subjecting Wende C. to engage in a sexual relationship with him, while contemporaneously counseling petitioner David C. with regard to his marriage to Wende C.

3. That during the period of January 1999 through April 2000, Pastor T. further subjected Wende C. to tales of his sexual exploits, the status of his failing marriage, in particular, looking for sympathy about his partner's sexual inadequacies; exposing Wende C. to a constant innuendo or sexual talk, suggestive comments, questions about the intimate details of her relationship with her husband and other suggestive comments, all in the guise of providing pastoral counseling to Wende C. and in breach of the sacred trust between counselor and care seeker in the course of the ministerial relationship.

The record on appeal to the New York State Court of Appeals showed that the romantic relationship between Wende C. and Pastor T. lasted until February of 2000, when David C. discovered e-mails that were being exchanged between Wende C. and Pastor T. In the e-mails, Wende C. declares love and affection for Pastor T. According to a chronology produced by petitioners, Wende C. and Pastor T. met on numerous occasions for "counseling sessions" at restaurants, and during these meetings, Pastor T. and Wende C. engaged in kissing and fondling.

In February of 2000, following the discovery of the e-mails by David C., Wende C. shared certain of the e-mails with other members of Hosanna Junction, stating that she was "hoping that these e-mails will show you that our relationship had been very mutual." The record on appeal made clear that Wende C. voluntarily continued the relationship with Pastor T. over a period of many months and numerous meetings, and that Wende C. and Pastor T. expressed mutual affection for each other.

After the discovery of the e-mails by David C., petitioners filed a Complaint with The Western New York Conference of the United Methodist Church (the "Conference") against Pastor T. The Conference commenced proceedings against Pastor T. on their Complaint. After commencement of the proceedings against him, Pastor T. resigned from the ministry.

Appellants commenced this action on November 2, 2000. The causes of action in the Complaint are as follows:

1. Assault and sexual abuse.
2. Intentional infliction of emotional distress.
3. Clergy malpractice.
4. Failure to protect plaintiff from the actions of Pastor T.
5. Negligent hiring of Pastor T.
6. Failure to establish proper guidelines and procedures for responding to sexual abuse.
7. Negligent hiring of Pastor T.
8. Failure to have Pastor T. "examined psychiatrically and/or psychologically to determine his fitness for serving in the capacity as a United Methodist Pastor."
9. Negligent retention and supervision of Pastor T.
10. "Indifference to a known pattern of sexual misconduct by certain pastors."

Each of these theories is clearly predicated on an assumption that the romantic relationship was an "assault" or "sexual abuse" because Wende C. lacked capacity to consent to a sexual relationship with Pastor T. The Supreme

Court, Monroe County (the "Trial Court"), in granting respondents' motion for summary judgment and denying petitioners' motion for summary judgment, ruled that regardless of how petitioners characterized their claims, the conduct alleged against Pastor T. is treated under New York law as the intentional tort of sexual abuse. The Trial Court ruled that petitioners' did not overcome the presumption in New York that adults are capable of granting or withholding consent to sexual relationships. In addition, the Trial Court ruled, under New York law, that the remaining respondents were not liable under the doctrine of respondeat superior because Pastor T. committed no actionable tort. Accordingly, the Trial Court dismissed petitioners' Complaint in its entirety.

The Appellate Division, Fourth Department affirmed the Trial Court's decision in its entirety. *Wende C. and David C. v. United Methodist Church, New York West Area, et al.*, 6 A.D.3d 1047 (4th Dept. 2004). First, the Appellate Division held that petitioners' sexual battery claim was properly dismissed as time barred under New York law and because the record established, as a matter of law, that Wende C's sexual relationship with Pastor T. was consensual. *Id.* at 1049. The Appellate Division held that petitioners' intentional infliction of emotional distress claim was properly dismissed because petitioners' allegations were not sufficiently outrageous under New York law to support this claim. *Id.* at 1049-1050. The Appellate Division also held that petitioners' clergy malpractice claim is not recognized in New York. *Id.* at 1050. In addition, the Appellate Division addressed petitioners' arguments regarding a breach of fiduciary duty claim, which petitioners asserted for the first time on appeal. The Appellate Division held that there was no distinction between the claim for clergy malpractice and the belated

claim for breach of fiduciary duty and, therefore, dismissed that claim. *Id.* at 1050-1052. Finally, the Appellate Division held that in the absence of any actionable underlying conduct by Pastor T., the remaining respondents could not be held vicariously liable under New York law. *Id.* at 1052-53.

On appeal from the Appellate Division, the New York Court of Appeals held that, as a matter of New York law, the relationship between Wende C. and Pastor T. was consensual. *Wende C. and David C. v. United Methodist Church, New York West Area, et al.*, 4 N.Y.3d 293, 298 (2005). Accordingly, the New York Court of Appeals found that the lower court properly granted Pastor T. summary judgment on the battery claim. The New York Court of Appeals then determined that petitioners' Complaint did not contain any allegation that Pastor T. breached his fiduciary duty to petitioners. *Id.* at 299. The New York Court of Appeals held that "[g]iven that no fiduciary cause of action is properly before us, we leave open for another day the question whether such a claim may arise between a cleric and a parishioner under very different circumstances not present here." *Id.* at 299. The Court of Appeals found petitioners' remaining contentions to be without merit and affirmed the dismissal of petitioners' claims.

Accordingly, contrary to the assertion by petitioners in the petition, the Court of Appeals dismissed the breach of fiduciary duty claim because petitioners did not plead that claim in their Complaint. The Court of Appeals left for another day the question of whether such a claim is viable in New York.

REASONS FOR DENYING THE PETITION

This Court does not have jurisdiction to review the judgment of the New York State Court of Appeals in this case. Petitioners incorrectly assert jurisdiction under 28 U.S.C. § 1254(1). Petitioners' reliance on § 1254(1) is misguided because that section provides jurisdiction for appeals from the United States Courts of Appeals rather than the New York State Court of Appeals.

The Supreme Court of the United States may review a judgment from a state's highest court under certain, very limited, circumstances. For example, this Court is jurisdictionally empowered to review a final judgment rendered by a state's highest court, by writ of certiorari, where a right claimed under the United States Constitution is at issue. 28 U.S.C. § 1257(a). However, the Court lacks the jurisdiction to review a state court's determination of a question of state law. *Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Where a state court's decision is based on both state and federal law, this Court has stated it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lambrix v. Singletary*, 520 U.S. 518, 522-523 (1997), quoting, *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Sochor v. Florida*, 504 U.S. 527, 533 (1992). Thus, because the Court may not review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would merely be advisory. *Lambrix v. Singletary*, 520 U.S. at 522-523; *Coleman v. Thompson*, 501

U.S. at 729. The Court must evaluate the state court's opinion to decide whether its judgment was based on an "independent and adequate" determination of state law. *Michigan v. Long*, 463 U.S. at 1042.

Of petitioners' ten causes of action plead in their Complaint, the New York Court of Appeals specifically addressed only the claim for sexual battery. The Court of Appeals held that any battery claim arising from contact between Wende C. and Pastor T. prior to November 2, 1999 is time barred. *Wende C. v. United Methodist Church*, 4 N.Y.3d at 298 (note 2). The Court of Appeals also held, for those allegations that occurred after November 2, 1999, that as a matter New York law the relationship between Wende C. and Pastor T. was consensual and, therefore, the claim was properly dismissed. *Id.* at 298.

The Court of Appeals then addressed petitioners' unplead claim for breach of fiduciary duty. The Court of Appeals affirmed the dismissal of this claim, without reaching the merits, because a cause of action for breach of fiduciary duty was not plead and was, therefore, not properly before the Court. *Id.* at 299. The Court of Appeals' rejection of Petitioners' fiduciary duty claim based on New York's procedural rules is an independent and adequate ground for dismissal. *See Kunkle v. Texas*, 125 S. Ct. 818 (2004). The Court of Appeals left open for another day the question of whether a claim for breach of fiduciary duty may arise between a cleric and a parishioner in New York. *Wende C. v. United Methodist Church*, 4 N.Y.3d at 299.

Accordingly, contrary to petitioners' contention, the decision of the Court of Appeals does not conflict with other state or federal courts and does not run afoul of the neutral

principals of law doctrine. The Court of Appeals simply decided that it would not decide a question based upon a claim which was not plead in petitioners' Complaint.

The Court of Appeals affirmed the lower courts' grant of summary judgment with regard to petitioners' other causes of action without discussion. Those claims are not at issue in this petition.

CONCLUSION

Respondents Western New York Conference of The United Methodist Church and Reverend David Lubba respectfully submit that the Petition herein should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(2)

No. 04-1574

IN THE

Supreme Court of the United States

WENDE C. and DAVID C. (ANONYMOUS),

Petitioners,

v.

THE UNITED METHODIST CHURCH, NEW YORK WEST AREA; THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH; DR. G. CHARLES TEN EYCK, Individually and in his capacity as Pastor of the HOSANNA JUNCTION UNITED METHODIST CHURCH; HAE-JONG KIM, Resident Bishop, THE UNITED METHODIST CHURCH, NEW YORK WEST AREA; DAVID LUBBA, District Superintendent, Rochester District, The United Methodist Church,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENT HAE-JONG KIM

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QUESTION PRESENTED

Respondent Hae-Jong Kim objects to the question presented in the petition. The New York State Court of Appeals expressly held that the plaintiffs failed to plead a cause of action for breach of fiduciary duty and, as a result, the Court left open the question of whether such a cause of action may exist under different circumstances. To the extent that any substantial federal question is found to exist, the question presented to this Court is more appropriately phrased as: Does the neutral principles of law doctrine affirmatively require a state to recognize any particular cause of action in tort?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF THE CASE	1
FACTUAL ALLEGATIONS	2
CHARACTERIZATION OF NEW YORK COURT OPINIONS	4
REASONS FOR DENYING THE PETITION	7
I. JURISDICTION	7
A. PETITIONERS' JURISDICTIONAL CLAIM	8
B. STATUTORY JURISDICTION	9
II. COMPELLING JUSTIFICATION	14
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Page

Cases

Adams v. Robertson, 520 U.S. 83 (1997) 10, 13

Allen v. Arguimbau, 198 U.S. 149 (1905) 11

Benz v. New York State Thruway Auth., 369 U.S. 147 (1962) 11

Crowell v. Randell, 35 U.S. 368 (1836) 12

Ennis Waterworks v. City of Ennis, 233 U.S. 652 (1914) 11

Ex parte McCardle, 74 U.S. 506 (1868) 7, 8

Hernandez v. New York, 500 U.S. 352 (1991) 14

Illinois v. Gates, 462 U.S. 213 (1983) 9, 10, 12

Jefferson v. City of Tarrant, 522 U.S. 75 (1997) ... 10

Maryland & Va. Churches v. Sharpsburg Church, 396 U.S. 367 (1970) 12

Michigan v. Long, 463 U.S. 1032 (1983) 13

Oregon v. Gefre, 903 P.2d 386 (Or. 1995) 12

Pollard v. Hagan, 44 U.S. 212 (1845) 7

Cited Authorities

	Page
Reich v. City of Freeport, 388 F. Supp. 953 (N.D. Ill. 1974)	11
R.W. Jones, Sr. v. Wolf, 443 U.S. 595 (1979)	11
State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154 (1945)	12
United States v. Burke, 90 F. Supp. 868 (E.D. Pa. 1950)	12, 13
Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983)	8
Webb v. Webb, 451 U.S. 493 (1981)	8, 12

Constitution, Statutes and Rules

U.S. Const. art. III, § 2	7
28 U.S.C. § 1254	8, 9
28 U.S.C. § 1257	8, 9, 10, 11, 17
Sup. Ct. Rule 10	9, 14
Sup. Ct. Rule 15	1

Respondent Hae-Jong Kim respectfully opposes the petition for a writ of certiorari to review the judgment of the New York State Court of Appeals.

STATEMENT OF THE CASE

Petitioners initiated this action in the New York State Supreme Court, Monroe County, seeking damages based upon assault and battery, intentional infliction of emotional distress, clergy malpractice and negligent retention and supervision. [Pet'r App. A-29a-30a, D-42a-49a]. All of petitioners' claims arise out of a sexual relationship between petitioner Wende C. and respondent Dr. G. Charles T. (Pastor T.).

The Supreme Court, in a written decision dated August 26, 2002, granted summary judgment in favor of the defendants and ordered the complaint dismissed. [Pet'r App. A-11a]. On appeal, the Appellate Division, Fourth Department and, thereafter, the New York State Court of Appeals both affirmed the trial court's decision. [Pet'r App. B-19a-20a, C-33a]. The original decision of the trial court [Pet'r App. A-1a-12a], and the majority opinions of the two appellate courts [Pet'r App. B-13a-20a, C-29a-33a], correctly set forth the relevant facts and identify the legal issues involved in the resolution of this case.

Petitioners' statement of facts and characterization of the decisions rendered by the various New York State courts is inaccurate in several respects. Pursuant to Supreme Court Rule 15(2), and to avoid waiving the issue in the event that the petition is granted, these misstatements are briefly set forth below. The resulting impact of these misstatements on the jurisdiction of this Court to grant a writ of certiorari and the appropriateness of this case for review by the nation's highest court are discussed in greater detail in the following sections.

Factual Allegations

Petitioner begins by claiming that "[i]t is undisputed that the Petitioners received contemporaneous secular marital counseling from Pastor T.". [Pet. 2]. In fact, the trial court found that whatever counseling may have occurred between Pastor T. and Wende C. ended in the spring of 1999, and that after that point it was "impossible to establish a counselling [*sic*] relationship by the cumulative assertions in plaintiff's affidavit. No question of fact as to any such relationship exists. . . . 'counselling' [*sic*] was a convenient cover story should the two be seen together. The court gives it no more weight." [Pet'r App. A-8a-9a]. Thus, the trial court concluded that, during the time period relevant to the complaint, no counseling relationship existed.

In affirming that decision, the Supreme Court, Appellate Division, further concluded that any counseling which might have occurred was necessarily religious, and not secular, in nature. The Appellate Division held that Pastor T. "was not a therapeutic counselor with any state license or state-recognized credentials, but rather was merely a religious counselor. There is thus no basis for concluding that the pastoral counseling relationship and behavior in question may be regarded as essentially secular in nature." [Pet'r App. B-18a]. The New York State Court of Appeals also noted that the complaint identified the alleged relationship between Wende C. and Pastor T. as a ministerial relationship. [Pet'r App. C-32a].

Therefore, it is the clear holding of the New York State courts that, during the relevant time period, there was no counseling relationship between Wende C. and Pastor T. and, to the extent that any counseling relationship did exist, it was religious, not secular, in nature.

Petitioner's also claim that Wende C. was a "vulnerable parishioner" [Pet. 2] and that Pastor T. continually "expose[d] Wende C. to unwelcome sexual contact" "at a time when she was unable to consent." [Pet. 4]. These claims are also in direct contradiction to the facts as found by the New York courts. The trial court found no evidence that "would raise the implication that Mrs. Cleary was incapable of consent[ing]" to the sexual relationship. [Pet'r App. A-9a]. The Appellate Division, more explicitly, held that the evidence "establishes as a matter of law that the romantic attachment was mutual and the sexual contact consensual on the part of Wende C." [Pet'r App. B-15a]. Similarly, the Court of Appeals concluded "that as a matter of law the sexual relationship between the parties was indeed consensual" [Pet'r App. C-31a], and that "[n]o record evidence exists that either Wende C.'s physical or emotional condition or prescribed medication impaired her ability to engage in a romantic relationship with Pastor T. or to consent to his physical contact." [Pet'r App. C-32a].

In contrast to petitioners' assertions, the New York courts consistently and uniformly held that Wende C. was able to, and did, consent to the romantic relationship and physical contact with Pastor T.

With respect to respondent Kim, petitioners allege that: "On December 13, 1999, a member of the church wrote to Respondent Bishop Kim and informed him that she believed an inappropriate counseling relationship was occurring between Wende C. and Pastor T." [Pet. 3]. This allegation is simply false. As the trial court noted, this letter "deals with other parishioners and with matters far removed from this relationship. If the plaintiffs are referred to in this letter they are never mentioned by name." [Pet'r App. A-10a].

Characterization of New York Court Opinions

Respondent Kim also takes exception to petitioners' characterization of the decisions rendered by the New York courts in this case. These mischaracterizations are critical because they directly impact both the jurisdiction of this Court to grant certiorari and the appropriateness of this case for review by the United States Supreme Court.

Petitioners indicate that the Supreme Court granted summary judgment to the respondents, other that Pastor T., because they "had no notice of Pastor T.'s conduct, despite the fact that Bishop Kim received a letter from another congregant in [*sic*] or about December 13, 1999 expressing concern over the nature of the relationship between Pastor T. and Wende C." [Pet. 7]. As explained above, and noted by the Supreme Court [Pet'r App. A-10a], the referenced letter concerned other individuals, other matters, and did not mention either Pastor T. or Wende C.

With respect to the decision by the Appellate Division, petitioners omit a key aspect of the court's decision. Petitioners state that the court held that it "should not adjudicate the claims of whether Pastor T. breached his fiduciary duties. . . ." [Pet. 7-8]. The court so held, at least in part, because it

> conclude[d] that there is no meaningful analytical distinction between a cause of action for breach of fiduciary duty by a cleric and one for clergy malpractice. Therefore, for the same reasons that a cause of action for clergy malpractice is not cognizable, a cause of action for breach of

> fiduciary duty by a cleric may not be predicated on the allegations set forth in this case.

[Pet'r App. B-17a (internal citations omitted)]. New York does not recognize a cause of action for clergy malpractice "because any attempt to define the duty of care owed by a member of the clergy would result in excessive entanglement on the part of the court in matters of religion. [Pet'r App. B-16a (internal citations omitted)].

There are, however, two important elements of the Appellate Division's decision affirming dismissal of the supposed claims for breach of fiduciary duty which petitioners have failed to mention. First, the court did not specifically hold that New York would not, under any circumstances, recognize a cause of action for breach of fiduciary duty against a cleric. Instead, the court simply held that such a claim "may not be predicated *on the allegations set forth in this case*." [Pet'r App. B-17a (emphasis added) (internal citations omitted)]. Second, the court repeatedly noted that the plaintiffs had failed to plead a cause of action for breach of fiduciary duty. [Pet'r App. B-16a ("At the outset, we note that *the closest plaintiffs have come* to alleging a breach of fiduciary duty. . . ."); ("That *purported* cause of action. . . ."); B-17a ("plaintiffs' *unpleaded* claim for breach of fiduciary duty. . . .") (all emphasis added)].

Petitioners also omit these important holdings from their discussion of the decision by the New York State Court of Appeals. The Court of Appeals, even more explicitly than the Appellate Division, held that plaintiffs had failed to plead a cause of action for breach of fiduciary duty. The Court stated: "Moving next to plaintiffs' contentions that Pastor T. breached his fiduciary duties to them, we note that these causes of action were not specifically pleaded." [Pet'r App. C-32a]. [*See also* Pet'r App. C-33a (". . . no fiduciary cause of action is properly before us. . . .")].

Because no cause of action for breach of fiduciary duty had been set forth in the pleadings, the Court "le[ft] open for another day the question whether such a claim may arise between a cleric and a parishioner under very different circumstances, not present here." [Pet'r App. C-33a].

Thus, contrary to plaintiff's characterization, the New York courts did not hold that the First Amendment prohibits, in all instances, recognition of a cause of action for breach of fiduciary duty against a cleric. Instead, both the Appellate Division and the Court of Appeals specifically held that plaintiffs had failed to plead such a cause of action. Both courts also indicated that the specific facts of this case would not support such a cause of action, even were it recognized, and therefore deferred the question of whether or not New York might, under some other set of circumstances, recognize such a claim.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied because this Court does not have jurisdiction in this matter and, even if jurisdiction existed, there is no compelling reason to justify discretionary review by the United States Supreme Court.

I. JURISDICTION

The United States Supreme Court, as a federal court, is a court of limited jurisdiction. *See Pollard v. Hagan*, 44 U.S. 212, 216 (1845) ("This court, inexpressibly valuable to the country, is yet a court of limited jurisdiction."). The appellate jurisdiction of the Court is conferred by the Constitution, subject to "such exceptions, and under such regulations as the Congress shall make." U.S. Const. art. III, § 2. Various acts of Congress have affirmatively described the Court's appellate jurisdiction, "and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within" the applicable statutes. *Ex parte McCardle*, 74 U.S. 506, 513 (1868).

Therefore, in determining whether appellate jurisdiction exists, the case must satisfy two requirements. First, the case must fall within the jurisdictional limits expressly set forth in Article III, Section 2 of the United States Constitution. Second, the case must not be excluded from the jurisdictional reach of the Court as limited by acts of Congress. It is important to note that both requirements must be satisfied, as Congress does not have the authority to expand the Court's jurisdiction, but only to limit it beyond that which is conveyed

by the Constitution. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983) ("This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution."). In this case, although petitioners may arguably satisfy constitutional jurisdictional requirements, they cannot satisfy statutory jurisdictional requirements. Therefore, the petition must be dismissed, as "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. at 514.

A. PETITIONERS' JURISDICTIONAL CLAIM

Petitioners attempt to invoke the jurisdiction of this Court based upon 28 U.S.C. § 1254(1). [Pet. 1]. This statute, however, is completely inapplicable to the current case and cannot provide a basis for granting certiorari, as it applies only to "[c]ases in the courts of appeals". 28 U.S.C. § 1254. The fact that New York's highest court happens to be called the Court of Appeals is not sufficient to treat this case as if it were from a federal circuit court of appeals. Instead, 28 U.S.C. § 1257 is the relevant statute governing appeals from a state's highest court. *See Webb v. Webb*, 451 U.S. 493, 495 (1981) ("Because this case come to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257.").

This is not an inconsequential distinction, as the two sections provide for appellate jurisdiction in very different circumstances. Section 1254 does not limit the Supreme Court's jurisdiction to particular types of cases, but instead provides for review by writ of certiorari in "any civil or criminal case". 28 U.S.C. § 1254(1). Section 1257 significantly limits the Court's appellate jurisdiction over state court cases, as discussed further in Part I(B), *infra*.

Nor does it appear that petitioners' citation to Section 1254 was simply a typographical error, as no portion of the petition addresses the specific jurisdictional limitations imposed by Section 1257 or contends that this case satisfies those requirements. Instead, the petition is devoted to addressing why this Court should grant certiorari, under the considerations set forth in Supreme Court Rule 10. However, this rule cannot convey jurisdiction. Rather, the rule serves only to explain the standards which the Court will employ in determining whether or not to grant certiorari, an issue which cannot be reached unless and until jurisdiction has been established.

B. STATUTORY JURISDICTION

In order for this Court to undertake review of this case, petitioners must establish that appellate jurisdiction exists under the statutory framework imposed by Congress. As stated in Part I(A), *supra*, petitioners have relied upon the wrong statute as conveying jurisdiction in this case. The Supreme Court's authority to review a final decision by the New York State Court of Appeals is governed by 28 U.S.C. § 1257(a). *See Illinois v. Gates*, 462 U.S. 213, 217 (1983) ("Our certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. § 1257). The statute provides that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where [1] the validity of a treaty or statute of the United States is drawn in question or [2] where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of

> the United States, or [3] where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (numbers in brackets added).

It is clear from the text of the statute itself that petitioners cannot establish jurisdiction. The statute specifies only three instances where a final judgment by a state's highest court may be reviewed by the United States Supreme Court, none of which apply to this case. The first two possibilities are clearly inapplicable, as petitioners do not challenge the validity of any treaty or state or federal statute. In fact, aside from the jurisdictional issues relating to 28 U.S.C. § 1257, no statutes are involved in this case. The third possible scenario is also inapplicable, as petitioners do not claim any right, privilege, or immunity under the Constitution, treaties, or statutes of the United States.

The appellate jurisdiction provided by 28 U.S.C. § 1257(a) is often referred to, and discussed in opinions, as the "the authority to review federal-question decisions made by state courts". *Jefferson v. City of Tarrant*, 522 U.S. 75, 76 (1997). Therefore, "unless a federal question ha[s] been both raised and decided in the state court", the Supreme Court does not have jurisdiction to review the case. *Illinois v. Gates*, 462 U.S. at 218. This rule must be scrupulously adhered to, "regardless of the significance of the underlying issue". *Adams v. Robertson*, 520 U.S. 83, 92 fn. 6 (1997).

To support jurisdiction, the federal question must also be substantial. *See Reich v. City of Freeport*, 388 F. Supp. 953, 955 (N.D. Ill. 1974) (noting that Supreme Court may only review the final judgment of a state's highest court "where a substantial federal question is involved."). *See also Benz v. New York State Thruway Auth.*, 369 U.S. 147, 147-148 (1962) (dismissing writ of certiorari as improvidently granted where case presented "no substantial federal question."). A federal question is not substantial, and will not support jurisdiction for review of a state court decision, where it is unsubstantial or frivolous. *See, e.g., Ennis Waterworks v. City of Ennis*, 233 U.S. 652, 657 (1914).

In order to satisfy the jurisdictional requirements of 28 U.S.C. § 1257(a), petitioners must demonstrate that they claimed a federal right, privilege, or immunity which was denied by the state court. *Cf. Allen v. Arguimbau*, 198 U.S 149, 154 (1905) (dismissing writ of error). Petitioners do not claim or assert any federal right, and any attempt on their part to do so would be frivolous and without support in law or fact. Although petitioners mention the First Amendment and the neutral principles of law doctrine, neither of these provide them with any right or privilege which is relevant to their claims.

The neutral principles of law doctrine simply provides that, in a dispute involving a religious organization, a state may determine an issue by resort to principles of state law which do not involve an inquiry into religious doctrine. *See R.W. Jones, Sr. v. Wolf*, 443 U.S. 595, 602-603 (1979). However, neither the First Amendment nor the neutral principles of law doctrine require that a state follow any particular method for resolving such disputes. *See id.* at 602. Instead, where the neutral principles of law doctrine applies,

it is up to the state court to determine the issue and no federal question is presented. *See Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (1970) (dismissing appeal for want of a substantial federal question). The neutral principles of law doctrine does not require a state to affirmatively recognize a particular cause of action in tort.

Additionally, even where a sufficient federal question exists which might otherwise provide for jurisdiction, the Supreme Court will not review a state court decision unless that federal question has "been both raised and decided in the state court below." *Illinois v. Gates*, 462 U.S. at 218. *See also Crowell v. Randell*, 35 U.S. 368, 392 (1836) ("If both of these requirements do not appear on the record, the appellate jurisdiction fails."). If the state court does not decide the issue, the Supreme Court may not consider it as the basis for jurisdiction. *See State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("Since the [state] Supreme Court did not pass on the question, we may not do so.").

This rule "permit[s] a state court . . . to rest its decision on an adequate and independent state ground." *See Illinois v. Gates*, 462 U.S. at 222. The Supreme Court "will not review a state court judgment when there is a nonfederal ground that independently and adequately supports the judgment." *Oregon v. Gefre*, 903 P.2d 386, 390 (Or. 1995). *See also Webb v. Webb*, 451 U.S. at 500 (noting that rule ensures state courts are provided opportunity to determine case on independent and adequate state grounds "that would pretermit the federal issue"); *United States v. Burke*, 90 F. Supp 868, 871 (E.D. Pa. 1950) ("a denial of a properly raised federal claim will not be disturbed when the judgment rests on adequate nonfederal grounds.").

Petitioners bear the burden of establishing that the federal question was properly presented to the state courts. *See Adams*, 520 U.S. at 86 (finding that petitioners failed to satisfy burden). If the state court is silent on the issue, there is a presumption that the issue was not properly presented, and, in order to establish jurisdiction under Section 1257, petitioners must present sufficient evidence to defeat this presumption. *See id.* at 86-87. *See also Burke*, 90 F. Supp. at 871 ("When it is not evident whether the federal issue has been passed upon, the Supreme Court will attribute state law, unless no other reasonable course is open, as the basis of the state court's judgment.").

The mere fact that a state court cites or discusses federal law is not sufficient to establish that the decision was based on federal grounds. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Even where a state court relies upon federal precedent for guidance, the Supreme Court "will not undertake to review the decision" as long as the state court indicates that the decision "is alternatively based on bona fide separate, adequate, and independent grounds". *Id.*

In the current case, petitioners seek review of the decision rendered by the New York State Court of Appeals. However, that decision clearly demonstrates that, to the extent that any federal question was involved, the judgment was based on adequate and independent state-law grounds. First, the Court held that petitioners' claims for battery could not succeed because "as a matter of law the sexual relationship between the parties was indeed consensual" and there was no evidence that Wende C.'s ability to consent was impaired. [Pet'r App. C-31a-32a]. This holding was based upon the specific facts of the case, [Pet'r App. C-31a-32a], and "in the absence of exceptional circumstances," the Supreme Court "defer[s] to

state-court factual findings. . . ." *Hernandez v. New York*, 500 U.S. 352, 366 (1991).

The Court then addressed petitioners' purported claim for breach of fiduciary duty. The Court specifically indicated, repeatedly, that this cause of action was not properly pled. [Pet'r App. C-32a-33a ("Moving next to plaintiffs' contentions that Pastor T. breached his fiduciary duties to them, we note that these causes of action were not specifically pleaded."); ("Given that no fiduciary cause of action is properly before us. . . .")]. To whatever extent a federal question may have existed in relation to petitioners' attempted breach of fiduciary duty claim, the Court of Appeals made it very clear that it was not deciding that question, as the claim could be resolved on state law grounds governing rules of pleading. The Court stated: "Given that no fiduciary cause of action is properly before us, we leave open for another day the question of whether such a claim may arise between a cleric and a parishioner under very different circumstances, not present here." [Pet'r App. C-33a].

Therefore, petitioners' claims were decided on independent state law grounds and no substantial federal question exists.

II. COMPELLING JUSTIFICATION

Review by the United States Supreme Court "on a writ of certiorari is not a matter of right, but of judicial discretion" which "will be granted only for compelling reasons." S. Ct. R. 10. Petitioners ask this Court to grant certiorari in this case "to resolve the circuit split. . . ." [Pet. 10]. However, the petition itself demonstrates that there is not actually a split of authority on the issue of recognizing a cause of action

for clergy malpractice. After noting that some courts have refused to consider claims for either breach of fiduciary duty or clergy malpractice, the petition states that: "Several other court have addressed the issue of clergy malpractice, *none explicitly recognizing it as a cause of action*." [Pet. 11 (emphasis added)]. Therefore, petitioners have conceded that the various jurisdictions uniformly reject a cause of action for clergy malpractice. Despite stating that a split of authority exists, petitioners have not identified a single case to recognize such a cause of action.

All that the petition arguably demonstrates is a possible split of authority regarding a claim for breach of fiduciary duty by a parishioner against a cleric. However, as discussed in Part I(B), *supra*, the New York State Court of Appeals specifically held that petitioners' failed to plead such a cause of action and, thus, the issue was not properly before the Court.

Petitioners' attempts to claim that the Court of Appeals' decision will result in immunity for clerics who engage in sexual misconduct toward parishioners, and will prevent victims of such conduct from seeking redress in the courts, is also completely unfounded. First, the Court did not hold that a claim for breach of fiduciary duty could not be brought. Rather, it only held that these petitioners had failed to properly plead such a cause of action. The Court specifically indicated its willingness to consider the issue under an appropriate set of facts and pleadings. In this context it is also relevant that the New York Courts held that no counseling relationship actually existed, but was instead only "a convenient cover story should the two be seen together." [Pet'r App. A-8a].

Additionally, the intentional tort of battery remains available to victims of clergy sexual misconduct. In this particular case, petitioners' battery claims failed due to statute of limitations grounds and because the courts specifically found that Wende C. was capable of, and did, consent to the sexual contact. Any parishioner who does not consent, or who is legally unable to consent, may maintain an action for battery, provided he or she brings suit within the applicable limitations period.

Negligent hiring and/or supervision may also be available against the church, religious organization or individual superiors, depending on the particular facts of the case.

Therefore, there is no compelling justification for granting a writ of certiorari in this case.

CONCLUSION

Respondent Hae-Jong Kim respectfully submits that the petition for a writ of certiorari should be denied. This Court lacks jurisdiction to review the decision of the New York State Court of Appeals under 28 U.S.C. § 1257(a), because petitioners do not claim any right or privilege under the federal constitution or the laws or treaties of the United States and, as a result, there is no substantial federal question. To the extent that any federal question exists, the state court based its decision on independent, alternative state law grounds and did not decide the federal question. Furthermore, even if jurisdiction existed, there is no compelling justification for granting review in this case. There is no split of authority regarding claims for clergy malpractice; such claims are universally rejected by state and federal courts. Even if a split of authority arguably exists with respect to claims against clerics for breach of fiduciary duty, that cause of action was not properly before the Court of Appeals and cannot provide the basis for granting certiorari. There is also no merit to petitioners' assertion that actual victims of clergy sexual misconduct will be left without adequate remedies.

Respectfully submitted,

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